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ABSTRACT

This collection of 18 papers review the fundamentals in collective bargaining in higher education. Areas discussed include arbitration, grievance preparation, the collective bargaining process, diversity, technology, staff bargaining, and faculty and staff participation in employee involvement schemes. An annual legal update is included. The papers are: (1) "Higher Education Collective Bargaining: Issues for the 21st Century" (Stephen Trachtenberg); (2) "Higher Education Unions in a Time of Change: Collective Bargaining and Affirmative Action" (Terry Jones); (3) "Recent Trends in Collective Bargaining in Canada" (Donald C. Savage); (4) "Reflections Upon 25 Years of Faculty Unionism" (Arnold Cantor); (5) "Compulsory Arbitration of Discrimination Claims under Collective Bargaining Agreements" (Nicholas DiGiovanni, Jr.); (6) "Arbitration in Faculty Higher Education" (Nicholas Russo); (7) "Grievance Preparation From the Union Perspective" (C. J. Elder); (8) "Grievance Preparation: A Management Perspective" (Esther Liebert); (9) A Union View of Faculty Collective Bargaining at the Two-Year Institution" (James Rice); (10) "A President Speaks on Faculty Collective Bargaining at the Two-Year Institution" (Salvatore G. Rotella); (11) "Bargaining Under the Shadow of Yeshiva at Hofstra University" (Estelle S. Gellman); (12) "Faculty Collective Bargaining at Adelphi University" (Stephen Goldberg); (13) "A Genuine System of Collegiality Would Tend to Confound Us" (George Sutton); (14) Staff Collective Bargaining in the California State University: Ending the Cycle of Non-stop Bargaining" (Samuel A. Strafaci); (15) "Staff Bargaining in Higher Education" (Brenda Richardson Malone); (16) "Participation in Decision-making in Higher Education: Oxymoron or Opportunity?" (Walter J. Gershenfeld); (17) "The Management Perspective" (Ira Michael Shepard); (18) "The Union Perspective" (David J. Strom and Stephanie Baxter). (LEE)

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HIGHER EDUCATION COLLECTIVE BARGAINING: BACK TO "CB" BASICS

Proceedings

Twenty-Fourth Annual Conference

April 1996

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School of Public Affairs, Baruch College,
The City University of New York

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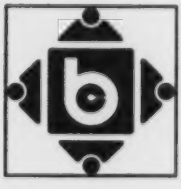

National Center for the Study of Collective Bargaining in Higher Education and the Professions
School of Public Affairs, Baruch College,
The City University of New York

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INTRODUCTION

INTRODUCTION

The Twenty-Fourth Annual Conference of the National Center, **Higher Education Collective Bargaining: Back to "CB" Basics**, was a review of the fundamentals in this field. It was felt that after a number of years of focusing on specific topics, that a reexamination of central issues was in order. Areas discussed include arbitration, grievance preparation, and the collective bargaining process. These and other subjects were presented in the context of public and private four-year institutions and community colleges.

In addition to the main theme of the conference, we always endeavor to present issues of current interest to practitioners and scholars in the field of higher education collective bargaining. Included this year were discussions of diversity, technology, staff bargaining, and faculty and staff participation in employee involvement schemes. Our annual legal update by labor attorneys representing management and union perspectives gave us an analysis of cases in the past year effecting those involved in collective bargaining in higher education.

LEADERS SPEAK OUT ON COLLECTIVE BARGAINING IN HIGHER EDUCATION

Stephen Trachtenberg, President of George Washington University, questions the validity of collective bargaining as a modality for the higher education community in the 21st century. Rather than its complete abolition, he suggests a substantial redefinition. Negative public opinion toward higher education and more limited public funding may force faculty to reassess the current structure of tenure and to develop a more precise measurement of their productivity. Trachtenberg also explores the effect of distance learning on the academy.

Terry Jones, President of the California Faculty Association, asserts that affirmative action, unions and collective bargaining are under attack throughout the United States in the courts and in some state legislatures. He discusses these in the context of higher education collective bargaining by: 1. identifying the players and their motives; 2. demonstrating the link between unions and affirmative action; 3. explaining affirmative action as a union issue; and, 4. looking at automation, computers, and the decline of jobs. Jones talks of sexism and racism, especially in terms of moves to eliminate affirmative action programs. Jones states that the combined efforts of civil rights organizations and unions brought in affirmative action and its inherent sense of fairness. Unions have always been concerned with social, political, and educational matters, as well as collective bargaining. He thinks that unions should continue to support affirmative action and to encourage diversity and multiculturalism.

Arnold Cantor, the recently retired Executive Director of the Professional Staff Congress, draws on his forty years of experience with teachers' unions to give helpful advice to practitioners of higher education collective bargaining. He says

that people of integrity are needed in both the union and management. One needs to understand how to be a leader in a high profile arena, exhibit a willingness to take risks, possess a knowledge of the field, and have a high degree of sensitivity to other people. Both union and management must have a genuine concern for the higher education enterprise.

Cantor goes on to outline what he would like to see in the future. He would like AFT and NEA to become one organization with a close cooperation between this new organization and the AAUP. He would like to see enabling legislation adopted by the remaining states to open the door to higher education collective bargaining. Promotion, within public perception, of the value of higher education in the United States must be done to assure adequate and well deserved funding of the academy.

Donald Savage, Executive Director of the Canadian Association of University Teachers, compared and contrasted higher education collective bargaining in the United States and Canada. Savage went on to speak of dramatic changes in collective bargaining in Canada during the past year due to drastic financial cuts at both the federal and provincial levels. He posits that as the first surge of collective bargaining came in the 1970's in response to a change from a sellers to a buyers market, so a similar rush to certification may be caused by current economic problems. Administrators are trying to weaken provisions in bargaining agreements. Some have even suggested that they be able to lay off faculty without declaring financial exigency, amounting, in effect, to the abolition of tenure. Savages goes on to present examples from several institutions, of conflicts between university administrations and their faculty bargaining associations.

ARBITRATION AND GRIEVANCE PREPARATION

Nicholas DiGiovanni, Jr., a labor lawyer with Morgan, Brown and Joy in Boston, presented a number of court cases showing the relationship between statutory rights and arbitration in discrimination cases. The cases concern the circumstances under which a party may be subject to arbitration and when he can bring his case to court. He also discussed cases in which a plaintiff could bring judicial action after exhausting the arbitration process. In some but not all cases, if a plaintiff seeks redress in a judicial action without exhausting his grievance rights under a union contract, summary judgment was granted by the courts. DiGiovanni discusses cases in which individual employees, not represented by a union and those under collective bargaining agreements may be forced to submit to binding arbitration and those in which they may choose a judicial forum.

Both employer and employee should consider the benefits of court litigation with the full range of judicial process and review, or the more cost-effective and expeditious route of arbitration.

Nicholas Russo, an attorney with the Professional Staff Congress, addressed his remarks to the status of grievance arbitration in the academy. He talks of

procedural rights to which a faculty member is entitled and the limits on arbitration. Russo describes the arbitration process at The City University of New York.

The PSC/CUNY collective bargaining agreement includes provisions which define and limit the scope of the arbitrator's authority. With certain exceptions the arbitrator is barred from ruling on the merits of "academic judgment" in the case of appointment, reappointment, promotions, and tenure. In disciplinary cases, the arbitrator may rule only on the guilt, innocence, or, where applicable, the appropriateness of the penalty.

Russo says that the current environment in which arbitration is operating is one in which restructuring and retrenchment are permeating decisionmaking by university administrators. He finally says that a strong faculty union plays an important role in ensuring an even playing field between faculty and administration since the union offers resources to the employee in dealing with his claim. He also urges the arbitrator to play a strong role in keeping the arbitration process fair and impartial.

C. J. Elder, Assistant Director of Contract Implementation for APSCUF, describes the process of preparing cases for grievance and arbitration hearings from the union standpoint. To do this, the union grievance representative must educate the union member regarding his rights under the labor agreement, assist them in writing and processing grievances, assess the merit of the grievance, investigate facts and gather evidence at the local and state/regional levels, and prepare grievances for arbitration. She discusses disciplinary, contract interpretation and past practice grievances.

Esther Liebert, Dean for Faculty and Staff Relations at Baruch College, gives helpful ideas for management representatives in preparing for the grievance process. She says that there is a three step grievance procedure which is used at The City University of New York. Liebert says that grievances can revolve around an assertion of unfair treatment or that there has been a violation of the collective bargaining agreement, or past procedures and practices of the institution. She gives examples of grievance situations to illustrate her points.

Liebert states that grievances can serve to clarify contract language and provide a day in court for the grievant. They can improve labor relations and communication between labor and management.

FACULTY COLLECTIVE BARGAINING AT TWO-YEAR INSTITUTIONS

James Rice, Secretary/Treasurer of the National Council for Higher Education for NEA, discusses the fact that in recent years, economic, social and political conditions have changed drastically in terms of state policy and budget developments causing academic restructuring and effecting such things as salaries and benefits. There is competition for funding with other state programs such as k-12 and prisons. A strong faculty union is, thus, needed to guarantee a secure

future in the academy. The union must be aware of change and develop new strategies as needed to cope with these changes.

Salvatore Rotella, President of Riverside Community College, speaks of the diminunition of public funding for higher education at both the state and federal levels. He says that this has caused increased workloads, more teaching hours and larger class sizes. He recommends starting to meet the challenge of doing more with less by emphasizing the amount of learning by the student rather than the amount of work by the instructor. A fundamental course-by-course examination and redevelopment would be needed to affect such a change. Interactive technology and distance learning could be used in this context. He concludes by saying that this new productivity could become the source of new funding and add a new dimension to the collective bargaining process.

FACULTY COLLECTIVE BARGAINING AT PRIVATE INSTITUTIONS

Estelle Gellman, a professor and President of AAUP at Hofstra University, spoke about her experience with collective bargaining at Hofstra University, with the specter of Yeshiva always present. Strikes by the faculty have been frequent as have threats of decertification from the administration. Regardless of the acrimony or lack thereof in the process, the union continues to define their goals, bargain for them in good faith, and hope to settle without a strike. The union must always keep in mind that they do not have the protection of the NLRA. They strive to cultivate unit solidarity and to come to the bargaining table from a position of strength and knowledge about the institution and its financial condition and to keep abreast of issues relating to working conditions and benefits. The union tries to make it clear to the administration that it is in the interest of the institution to negotiate with the faculty rather than to decertify them, that the negative outcomes would far outweigh the positive.

Stephen Goldberg, a professor, immediate past President and current Vice President for Grievance of AAUP at Adelphi University, details the history of collective bargaining at his institution, and discusses the current situation. From 1976-1984, bargaining was based on proposals developed by the AAUP with the administration contributing little in the way of new contract language. After that time the administration team has come up with very specific proposals in a number of areas. Several changes have been made in the collective bargaining agreement and associated documents, most of which give more power to the administration.

In November of 1995, the administration informed the AAUP that it was going to file a unit clarification petition with the NLRB to decertify the Adelphi AAUP bargaining unit. The AAUP has successfully challenged the first filing of this petition, but expects that a new filing will be made. Because of the lack of distinction between professional and managerial roles of faculty in the Yeshiva decision, and the resulting threat of decertification, the collective strength of faculty in working out legitimate employment issues has been made more difficult.

George Sutton, University Counsel for Long Island University, addresses the potential impact of the Yeshiva decision on the higher education collective bargaining process at the private institution. He discusses the circumstances under which a college or university will probably use the Yeshiva "card." The two main circumstances under which management may choose this extreme action is when management believes that the governance structure of the institution is threatened by the faculty collective bargaining unit, or when, during severe fiscal difficulties, the administration feels that the faculty union is being difficult. Due to the possibility of non-faculty unions honoring faculty picket lines, and the likelihood that the political community will support the strikers, management hesitates to invoke Yeshiva except in extreme circumstances. Unless the relationship between collegiality, governance and management interests are somehow thrown out of balance, management will probably tolerate the existence of the bargaining unit.

EMPLOYEE ISSUES

Samuel Strafaci, Senior Director of Employee Relations for the California State University System, presented recent developments in staff bargaining. Until the early 1990's salary negotiations for the eight staff unions and the faculty union awaited passage of the state budget. Salary increases retroactive to the beginning of the fiscal year were the rule. The strategy which California State University developed for 1995/96 made the resolution of economic matters contingent on specific budgetary allocations by the state legislature to CSU, and also making economic proposals effective only when the new contract was ratified. The faculty bargaining unit and several staff units reached timely agreements which are in effect until June 30, 1998.

Brenda Malone, Vice Chancellor for Faculty and Staff Relations of The City University of New York, discussed the collective bargaining agenda for staff at this institution. She stated that negotiations at CUNY are which currently in progress with the faculty and are soon to be commenced with the staff, are made more difficult due to the fiscal crisis being faced by New York State. Recent New York City and State staff contracts reflect national trends toward longer-term contracts, fewer across-the-board increases and more one-time lump sum bonuses. The need of employers is to maintain economic stability, and the need of unions is to maintain jobs.

There are differences between faculty and staff collective bargaining in higher education. Staff traditionally have more concern with salary increases, enhanced benefits and other conditions of employment with little interest in governance. Some increased interest in working with management in charting the course of the institution has occurred as funds for higher education have diminished. Budgetary problems have caused both faculty and staff to focus more on job stability.

Walter Gershenfeld, President of the Industrial Relations Research Association, presents the methodology for setting up and running a successful

employee participation group in an institution of higher education, including faculty, staff and students. After stating his assumption that employee participation should be encouraged, he starts out by discussing faculty involvement in decisionmaking, but also goes into participative roles for staff, students, and administration. He finishes by presenting ten principles of participation useful for improving input into a decisionmaking system at a college or university. If there is a bargaining agent, it is the lead group for such participative initiatives. Of course, the faculty senate is also pivotal. Participative groups within the university must make their contributions within the framework of existing structure, dealing with the problem of overlapping jurisdiction. A staff participative program could be established in concert with the faculty program where their interests overlap. Where only one or the other's interests come into play, the two committees could meet separately. A concentric circle approach could be used to include all of the various campus interests -- faculty, staff, students, administration, and trustees.

ANNUAL LEGAL UPDATE

Ira Shepard, Chairman of the Labor Law Section of a Washington based law firm which represents the administrations of colleges and universities, analyses recent cases affecting higher education collective bargaining. His paper presents five important issues dealt with by the National Labor Relations Board (NLRB) during the past year, and with recent developments in the area of sexual harassment. These involve jurisdiction of the NLRB, the discharging of an employee for refusing to work during a strike, the use of an employer provided ombudsperson, requiring employees to sign mandatory arbitration agreements, and issues concerning the major league baseball negotiations. The sexual harassment case dealt with academic freedom and the First Amendment.

David Strom, In-House Counsel for the American Federation of Teachers, and Stephanie Baxter, Associate Counsel, present a series of recent court cases impacting higher education collective bargaining. Cases dealt with such issues as reduced benefits for newly hired state employees, furlough of employees, unfair labor practices, and unit determinations regarding graduate assistants and adjunct faculty. Strom and Baxter further presented significant statutory changes affecting bargaining. They discuss cases involving deferral to arbitration, and judicial review of arbitration. Due process rights of faculty members charged with sexual harassment at both public and private institutions is covered. Cases involving tenure were presented. The question of compulsory arbitration of discrimination cases rather than use of the judicial forum was discussed.

THE PROGRAM

Set forth below is the program of the Twenty-Fourth Annual Conference listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to

submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed in the papers are those of the authors, not necessarily their organizations or of NCSCBHEP.

MONDAY MORNING, APRIL 15, 1996

WELCOME
Ronald Berkman, Dean
School of Public Affairs, Baruch College

KEYNOTE - COLLECTIVE BARGAINING IN HIGHER EDUCATION

Speaker: Stephen Trachtenberg, President
George Washington University

Presiding: Matthew Goldstein, President
Baruch College, CUNY

PLENARY SESSION A
CURRENT ISSUES IN FACULTY COLLECTIVE BARGAINING

Speakers: Daniel Julius, Assoc. V.P. Academic Affairs
University of San Francisco

Donald Savage, Executive Director
Canadian Association of University Teachers

Moderator: Frank Annunziato, Executive Director
Professional Staff Congress, AFT

PLENARY SESSION B
ARBITRATION IN FACULTY HIGHER EDUCATION

Speakers: Stephen Finner, Director
Chapter & State Services, AAUP

Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown & Joy, Boston, MA

Nicholas Russo, Esq.
Professional Staff Congress, AFT

Moderator: Joel Douglas, Professor
Baruch College, CUNY

MONDAY AFTERNOON, APRIL 15, 1996

LUNCHEON
DIVERSITY AND HIGHER EDUCATION COLLECTIVE BARGAINING

Speaker: Terry Jones, President
Calif. Faculty Assn., AAUP/NEA

Presiding: Frederick Lane, Professor
Baruch College, CUNY

CONCURRENT SESSION C
FACULTY COLLECTIVE BARGAINING AT THE TWO-YEAR INSTITUTION

Speakers: Denis Bogusky, President
Federation of Technical College Teachers, CT, AFT

James Rice, Professor, Quinsigamond Comm. Col.
Sec./Treas., Nat'l Council for Higher Ed., NEA

Salvatore Rotella, President
Riverside Community College

Moderator: Rachel Henrickson, Organizational Specialist, NEA

CONCURRENT SESSION D
FACULTY COLLECTIVE BARGAINING AT PRIVATE COLLEGES - UNDER THE SHADOW OF *YESHIVA*

Speakers: Estelle Gellman, Professor
Hofstra University, AAUP

Stephen Goldberg, Professor
Adelphi University, AAUP

George Sutton, University Counsel
Long Island University

Moderator: Perry Robinson, Deputy Director
College and University Dept., AFT

TECH SESSION
GRIEVANCE PREPARATION

Speaker: C. J. Elder, Asst. Dir., Contract Implementation
APSCUF

Esther Liebert, Dean for Faculty and Staff Relations
Baruch College, CUNY

Moderator: Eugenia Bragen, Lecturer
Baruch College, Professional Staff Congress

TUESDAY MORNING, APRIL 16, 1996

PLENARY SESSION E
HIGHER EDUCATION COLLECTIVE BARGAINING LEGAL UPDATE

Speakers: Ira Shepard, Esq., Chairman, Labor Law Section
Schmeltzer, Aptaker, & Shepard, Washington, DC

David Strom, Esq., In-House Counsel, AFT

Moderator: Joan Gibbons, Esq., Hearing Officer
Office of Faculty & Staff Relations, CUNY

PLENARY SESSION F
STAFF BARGAINING

Speakers: Samuel Strafaci, Senior Director of Employee Relations
California State University System

Brenda Malone, Vice Chancellor for Faculty and Staff
Relations, CUNY

Thomas Ferris, Uniserv Director
Michigan Education Association, NEA

Moderator: Trudy Rudnick, President
Local 3882, New York University, AFT

PLENARY SESSION G
FACULTY AND STAFF PARTICIPATION IN SHARED GOVERNANCE
AND EMPLOYEE INVOLVEMENT SCHEMES

Speakers: Walter Gershenfeld, President
Industrial Relations Research Association

Joel Rogers, Professor
University of Wisconsin

Moderator: Lois Cronholm, Provost
Baruch College, CUNY

TUESDAY AFTERNOON, APRIL 16, 1996

LUNCHEON
REFLECTIONS UPON 25 YEARS OF FACULTY UNIONISM

Speaker: Arnold Cantor, former Executive Director
Professional Staff Congress

Moderator: Eileen Buschell, Professor
Marymount College, President, NYS Conference, AAUP

SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, The City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- An annual Spring Conference
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.

- The National Center Newsletter, issued four times a year, providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs -- complete coverage of a major problem or area, sometimes of book length.

- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

A special thank you is due to Frank R. Annunziato, Executive Director of the Professional Staff Congress, who as Director of NCSCBHEP through December of 1995, developed the program for this conference and arranged for a number of the speakers. Members of the National Center's National and Faculty Advisory Boards also contributed many fine ideas for speakers and topics. We are, of course, grateful to all of the speakers and moderators who so ably presented papers and guided the conduct of sessions. A thank you is also due to the Center's College Assistant, Karen Daniel for her help and support in preparing for this event. We are also delighted to welcome Douglas H. White as the new Director of the National Center.

Beth Hillman Johnson
Administrative Director

I. LEADERS SPEAK OUT ON HIGHER EDUCATION COLLECTIVE BARGAINING

A. Higher Education Collective Bargaining: Issues for the 21st Century

B. Higher Education Unions in a Time of Change: Collective Bargaining and Affirmative Action

C. Recent Trends in Collective Bargaining in Canada

D. Reflections Upon 25 Years of Faculty Unionism

LEADERS SPEAK OUT ON HIGHER EDUCATION COLLECTIVE BARGAINING

A. HIGHER EDUCATION COLLECTIVE BARGAINING ISSUES FOR THE 21ST CENTURY

Stephen Joel Trachtenberg, President
George Washington University

It does not happen often, but it does happen. I am ask to speak on a subject that in effect splits me in two. The two sides of myself confront each other, and I slowly but surely discover that my personal struggle is not merely personal, that it is actually representative of some ambivalences that my fellow Americans tend to feel.

And that is what happened when I was asked to address you, on the subject of "Collective Bargaining in Higher Education." The first thing I discovered, when I began thinking about this subject, was just how uncomfortable I tend to feel when the phrase "collective bargaining" is put in the same basket, so to speak, with the phrase "higher education."

If the education is in fact higher, my inner voice whispers, then should it make its interests felt through unionization, whose American roots go back to the I.W.W., Walter Reuther, John L. Lewis, and the heyday of the assembly-line in the city of Detroit? Rather than enroll college professors in this tradition of big-bicep unionization, should we not pay more attention to the Supreme Court decision in the Yeshiva case, which saw the professorate as playing a far more consequential role in the conduct of their
institutions than could ever have been aspired to by those working on America's assembly-line in the earlier twentieth century?

But no sooner has this inner voice ceased its whispering than another one pops up inside my head. "Shame on you!" it cries. "The Supreme Court was studying the case of an independent university. And the vast majority of American students are now enrolled in schools that are run by their respective states and cities -- at a time when those states and cities are being pummeled by our new and frantic world of cutbacks and downsizing. The fact is that most schools of higher education are having to go head-to-head with firemen, policemen, and other civil servants in the quest for salaries and benefits -- and that is true of our elementary

and high school teachers as well. Like those in many other civil service professions, those who work in higher education also have to sit at negotiating tables with governors, state legislators, and mayors. And that being the case, my second inner voice continues, "what do these college teachers gain by upholding a 'nobility image,' rooted in ancient universities like Oxford, Cambridge and the Sorbonne, rather than an up-to-date muscular image, rooted in the capacity to strike and to cause some real social pain? Steve, I said to myself, your reluctance to see the professorate use the power of collective bargaining is like sending a bullfighter into the ring with his arms tied behind him. Wise up, will you?"

So my two voices go back and forth, leaving me -- in a state of deepening exhaustion -- smack in the middle. Yes, yes, I admit it. I found my own way into higher education at least partly because I regard it as -- quote -- "above" some of the nastiness and outright moral squalor of the worlds devoted to either making money or competing for power or both. And yes, yes, I also admit that I would hate to see an "above" of this kind translate into a financial "below." A man or a woman spends so many years of hard work acquiring the skills to function as a college professor. If all of that effort is ignored by those who determine his or her salary and benefits, then do not all of our traditions insist on his or her duty to unionize -- and to explain to those in power, by means of a strike, if necessary, what higher education is, in fact, all about?

Only after batting these internal handballs back and forth in my internal court do I finally manage to get beyond them. And as I prepared to stand in front of you today, I discovered that beyond these two voices ... the one that feels not-too-good about collective bargaining and the one that feels it to be irreplaceable ... there is a third voice, one that I will go so far as to call my "Inner Statesman."

"Steve," this third voice declared, "shouldn't you and the others gathered at the Doral Inn give some serious thought to the actual position that our colleges and universities now occupy in American life? Higher education seems to have moved, in recent years, from being some kind of Gibraltar to functioning as some kind of Cinderella. And what else would you expect in a country whose citizens are now feeling as economically insecure as ours? Here you have got all these 55-year-olds who have been bounced from their jobs just as they were getting ready to save hard for retirement. And here you have got these unionists with tenure, asking everyone to ignore their employment security and to focus attention, please, on their salaries and their benefits. If those hammering Fords and Chryslers together in the 1930's had tenure, no less, would there ever have been a Walter Reuther?"

And to my third voice I say: Now that is what I call getting serious. Recent years have witnessed enough denunciations of tenure, and enough bitter critiques of the alleged professorial lifestyle, to raise the question: "Will either the pre-union image of fifty years ago, or the post-union image of right now, be the right one for higher education to adopt in the 21st century?" Even the retirement plan called TIAA-CREF has come in, after all, for its share of the snide comments by those critics who argue that our colleges and universities are collectively failing to meet America's needs.

To which we must add, in almost the same breath, the upheaval represented by information technology. As all of you know, computers and the Internet have bred apostles of a certain kind. "The day is ending," these apostles insist, "when the university as a factory of learning somehow paralleled a building in Detroit as a factory for cars. 'You stick on headlights, we shovel in reasoning powers.' No," the apostles declare, "distance learning is the true wave of the future. Stationary and expensive-to-maintain stretches of real estate known as 'campuses,' requiring twenty thousand students to migrate to their acreage from the ends of the earth, are now transforming themselves into a new system altogether, in which student and teacher can be anywhere at all. Universities will adapt to this new electronic order -- even if adaptation amounts to total self-transformation -- or they will die."

In the world of distance learning, obviously, it becomes harder and harder to draw a clear connection between the amount of work actually being done by a faculty member and the amount of money he or she is paid. The conscientious professor, after all, is one who can be electronically reached -- from Norway or Beijing, if necessary -- at all hours of the day and night. But do we seriously expect, when salary-and-benefit-time roll around, for those making the decisions to somehow take into account the 17,986 contacts this process added up to in a particular academic year? Or the fact that the professor sat in front of his computer at 3:00 in the morning, sometimes, nursing a student in Singapore or Mexico City through a fit of self-doubt?

Similarly, conscientious research today often involves a non-stop flurry of contacts in which all kinds of information is exchanged by colleagues located all over the world. A professor at work in the Vatican Library, who happened to stumble upon a Greek text that casts unexpected light on the epistles of Saint Paul, may have reached fifty other experts in the field before reaching dinnertime on the same day. Even if those contacts are instrumental in transforming study of the New Testament, will they be weighted accordingly when important decisions are made about salary, benefits, and tenure? Or will the professor be asked to mark time until her book is finally complete and is published, following the usual delays, by a university press?

I do not have to tell you how much anxiety is currently being generated as a result of "distance learning." Faculty members are at risk of gross exploitation, some analysts assert. They are going to end up working twice or three times as hard for less pay, this viewpoint warns. E-mail will turn into a malignant system that even Dante failed to envision in the Inferno, and competition will become as global as that which now obtains where the manufacture of shirts and sneakers is concerned. Global University Number Five, based in Bangkok, and with faculty drawn from every continent, will provide the kind of challenge that even the University of Texas or the University of Michigan cannot stand up to. Above all, those schools that can maintain the lowest costs while teaching the largest number of students ... those who can master the very latest modes of interactive information technology with the most successful "style," while totally ignoring the concerns typical of a full-scale campus ... are going to set the pace for their American competitors. And what good will collective bargaining do in a world like that?

What the debate over "distance learning" suggests ... and what other current higher education issues confirm ... is that we are now living at a moment in history when "the outside world" is crashing in on the internal governance of our colleges and universities -- including those which are sponsored by individual states and cities, and thus already have the sense of being intruded on. The force known as accreditation often operates in such a way as to maximize or minimize a particular department's ability to demand higher salaries and benefits, drawn from a limited university budget. And in a country so often suffering from the condition known as too many ... too many Ph.D. scientists, too many lawyers, too many physicians ... the even more potent force known as the marketplace exerts a pressure all its own, insuring that some fields experiencing a diminishing number of applications while others can barely handle the bags of mail that arrive each day at their offices.

Now take account of how all these forces chemically interact in an average semester, and the question with which we are wrestling -- "Is the collective bargaining metaphor the right one for higher education in the 21st century?" -- becomes a question which is even more relevant.

What we are having to deal with as that century approaches is the possibility that our schools of higher education are museum-pieces of a certain kind. Move yourself forward only a little way in American life, and imagine a hearing in a particular state capitol at a time when the most horrifying stories are pouring in. The hearing is held at a time when the state, hit hard by federal cutbacks, is not managing to deal successfully with its orphaned children, its disabled citizens, its senior citizens, and its crumbling infrastructure. The chancellor of the state university has just posed the usual arguments for a budget larger than the previous year's, given the rate of inflation, and Senator McChoakum lifts onto the table, so the TV cameras can pick it up, a photo of the 22 children who recently died in a school bus when a major bridge collapsed. "Dr. Goodheart," the senator asks through clenched teeth, "this budget of yours includes $600,000 for the maintenance of landscaping, and almost a million-and-a-half dollars for new roofs and windows. Can more of your professors not just stay home and do their work on the Internet? Can we not shut some of these academic playgrounds down."

But what all that I have said so far entails may not be the end of collective bargaining in higher education so much as its complete or substantial redefinition.

As was true in the great heyday of American unionization, when Walter Reuther had good reason not to walk alone down a dark street at night, collective bargaining works best when the broad American public is sympathetic to those bargaining on labor's side of the table. The thugs who once used sticks and stones against union organizers, like the Southern sheriffs who turned dogs loose on blacks demanding their Constitutional rights, saw to it that the American public would not blanch in horror at a weapon like the strike. And the tectonic shift this represented in American thinking helped to convince management that the time for compromise had arrived.

Can we say the same thing about the cause, today, of faculty unionization in our colleges and universities? The answer, I fear, is no. Not only have our schools of higher education been enduring a very bad press in recent years, most recently as a result of a report issued by the National Association of Scholars on the decline of curricular requirements, but they are also starting to be perceived as competitors for a limited number of tax dollars -- competitors whose success would inevitably penalize some of the most needy people in our country.

One of the first tasks of faculty unions today, therefore, seems to me to be the attraction to their cause of empathy, if not sympathy, on the part of their fellow citizens. Having learned to regard college professors as the alleged exploitative beneficiaries of an institution like tenure, Americans must learn to see them, once again, as benefactors and guides -- benefactors, above all, where America's competitive standing in the international economy is concerned. That, I would say, is the first prerequisite for successful collective bargaining in the 21st century.

A second prerequisite is a conscious program aimed at turning computers and distance learning into a strength rather than a threat. A few minutes ago I suggested that the decision-makers when it comes to salaries, promotion, and tenure are unlikely to take full account of the work involved, for a faculty member, in distance learning. But this should not be taken as meaning that information technology has no role to play in the quest for economic justice by faculty unions. For individual faculty members, a computer can serve as an absolutely superb source of confirmation when it comes to questions of work actually performed. For example, the fact that a teacher's computer is on and receiving can serve as the equivalent of traditional "office hours" -- but an even better equivalent, in many ways, because it would require an independent witness to confirm that a teacher's posted office hours were kept on a particular day or in a particular week.

Computers can record the minutes and hours spent on virtually every aspect of academic work, including preparation for classroom teaching -- which is often alleged to take up thirty or forty hours per week. But allowing this kind of evidence to play a role in collective bargaining raises certain issues for faculty unions -- issues that are reminiscent of earlier phases of the American labor movement. For many years now, faculty members have intuitively and strongly resisted attempts to document their work-time, and a typical faculty cry has been: "What do you take me for? Some kind of blue-collar worker punching a timeclock?" If faculty unions seek to obtain work-time data via the computers of their members, they will quickly discover that this sentiment has not melted away to any significant extent. And before they are able to use such data to build a case for higher salaries or improved benefits, the unions will have to convince their members that data of this kind is now indispensable.

Finally, and very uncomfortably, the cause of collective bargaining in higher education is going to have to deal with the bugaboo known as tenure. Tenure has melted away in most of the professional areas where it once applied, *de facto* or *de jure*. We are living in a world, right now, where insecurity about one's income

is being treated as an economic virtue. The less certain people are about their next paycheck, runs the implied or explicit argument, the harder and more productively they work -- which translates into strength for their companies and their countries. And as insecurity of this kind becomes global as well as national ... as Japanese corporations, for example, become much less reluctant to downsize ... tenure becomes, especially for faculty unions, a dreadful embarrassment, always getting in the way of their efforts to build public and legislative support.

What higher education unions will have to demonstrate, I believe, is a willingness to bargain where tenure is concerned -- even as they insist that state and municipal governments be willing to bargain where salaries and benefits are concerned. Tenure will seldom be abolished altogether. But more limited contracts -- of five or ten or even twenty years -- will become increasingly common. Tenure was never intended to be a lifetime guarantee of employment. It was intended to insure that due process was provided to faculty in their personnel relationships with institutions of higher learning.

From the point of view of sheer nostalgia, the development of collective bargaining in higher education is a cause for regret. But from the point of view of those seeking economic justice for college teachers, so is the fact that the alleged sins of higher education are likely to be proclaimed, these days, from the front pages of our newspapers and on prime-time TV. On the one hand, we are trying to convince our ultimate judges -- the American public -- that collective bargaining is not necessarily limited to those banging pieces of metal together, or even those who process daunting class after class in our challenging 20th century public elementary and high schools.

But our attempts to do this must not blind us to the very ambivalent reactions that higher education now tends to stir up in the hearts of the American public. Americans want us to strengthen the careers and the life-incomes of their children. They also want us to help strengthen the competitiveness of the American national economy in a bitterly competitive world. And that, plus our steadily rising tuitions, is why Americans are paying such relatively close attention to us ... so much closer than anything that could have been imagined half a century ago.

Union advocates must factor that level of attention -- and that level of concern -- into their thinking. If the public wants to know what professors actually do for their paychecks, do not imagine that a union spokesperson can reply: "Our members prefer to keep that confidential." In an increasingly college-educated nation, a so-called "average American" is today an American who has spent time in a college classroom. God forbid that he or she ever arrived at a professor's office during a posted office hour and found the door locked and the professor absent. And God forbid that all of American higher education gets on the wrong side of America's governors and legislators as they struggle with the tumult now represented by economic change and federal cutbacks.

To work efficiently, unions require members who are susceptible to collective discipline. Such is not the reputation of America's college professors, who have often chosen their careers because they want to be both independent and salaried. Thus, our academic unions, as they move toward and into the 21st century, had better get prepared for a two-front war: against the forces of economic injustice, but also against some of those on behalf of whom they are battling those forces. And the day will come more than once, I fear, when union professionals and collective bargainers look in the mirror, tug at their hair, and cry out in frustration: "With troops like these, who needs enemies?"

LEADERS SPEAK OUT ON HIGHER EDUCATION COLLECTIVE BARGAINING

B. HIGHER EDUCATION UNIONS IN A TIME OF CHANGE: COLLECTIVE BARGAINING AND AFFIRMATIVE ACTION

Terry Jones, President
California Faculty Association

INTRODUCTION

> Every Negro child is the victim of the history of his race in this country. On the day he enters kindergarten, he carries a burden no white child can ever know.
>
> John H. Fisher, Past President
> Columbia University's Teacher College

During the 1960's and 1970s many of us fought to change this reality described by Fisher, some losing their lives in the process. At the height of the Civil Rights struggle the bureaucratic solution of affirmative action was instituted as a partial solution to years of racism and oppression. There now are no riots and burning cities or marches through city streets and down dangerous country roads. Is this because conditions are better or is it because we have become so overwhelmed by our own problems that we do not see little Black girls and boys growing up and living their lives as victims of the history of their race? Do we care? It has not been so long ago that Civil Rights workers and unionists said we do care. I believe it is time to demonstrate our concern once again.

Throughout the country affirmation action, unions, and collective bargaining are under attack. Affirmative action is being challenged in courts and in some state legislatures. Several states have introduced legislation to eliminate collective bargaining and, in my own state, California, the last round of bargaining came dangerously close to union busting on the part of the administration of the California State University.

Win or lose, how these attacks play out will greatly impact higher education as we know it. Although, battles to protect higher education, affirmative action,

unions, and collective bargaining will be won or lost far from the halls of academia. Faculty unions can be a deciding force. The choice is on which side to be. To frame this discussion, I will identify four interrelated points using examples from my organization, the California Faculty Association. The four points include:

1. identifying the players and their motives;
2. the link between unions and affirmative action;
3. affirmative action as a union issue;
4. automation, computers, and the decline of jobs.

THE PLAYERS

It is ironic that a professor from California State University, Hayward should be asked to come to New York to discuss a diversity topic, a topic related to affirmative action. That irony stems from the fact that California's major ballot initiative to end governmental affirmative action programs, the California Civil Rights Initiative, was started and is led by my colleague, Glen Custred. Not a day goes by without someone asking, "Isn't that Custred guy on your campus?" Actually, Custred has been laboring away quietly at Hayward for more than twenty years. He has always been a model university citizen; teaching students, advising, serving on committees, and doing research. Now Custred is famous!

A special set of circumstances have coalesced to bring him and his colleagues into prominence. A downturn in the economy, global competition in business, escalating automation, and the persistence of racism and sexism operate to constrict and constrain us all. As if this were not enough, we have allowed the rhetoric of our ideals to delude us into a state of "genesis amnesia." For whatever reason, whether it be greed, ignorance or denial, we are all too willing to overlook the impact of historical and current day racism and sexism as we extol the values of hard work and merit. Instead of attacking these real and complex issues facing our society, a growing number of political leaders fail us by looking for simplistic quick fix solutions. They place affirmative action in black face and practice the age old game of wedge politics. In good times and bad, Black people make good scapegoats. Connect Blacks to affirmative action and the Western world's greatest scapegoat has been created.

The leaders of the California Civil Rights Initiative (CCRI), whether African American, European American, Asian American, or Latin American, are themselves diverse in a sense. They include college professors, industrialists, politicians, talk show hosts, and university administrators. But it is not their diversity which defines them. What they have in common is that they already have gotten their share, or more of the American pie. They are economically secure, educated, and socially well established. In a real sense, then, you could say that the CCRI is about those who have trying to make sure that others do not get the chance to have.

However, there are others in opposition to affirmative action now. Young white males who are feeling alienated and angry and older white males who are

being squeezed out through corporate downsizing and outsourcing. Together, these groups represent a growing discontent with the form and structure of American society. However, their real problems are hardly with affirmative action or people of color.

As the leaders of the CCRI escalate their attacks on women and people of color, we should remember that it was the combined efforts of civil rights organizations and unions that brought us affirmative action and the sense of fairness it provides. There is a common bond that binds unions and civil rights organizations. The civil rights movement was about changing the status quo and helping those with less get more -- power, the right to vote, jobs and money. Unions too have challenged the status quo to gain more for their members. Those who are advantaged by the status quo, who want to call the shots, allocate resources without question, and, above all, maintain their advantaged positions, have always blocked the efforts of civil rights organizations and unions. These power brokers and gatekeepers have never exhibited much interest in sharing and they have continuously opposed civil rights programs and union efforts. They oppose civil rights and union efforts because both have been vehicles through which working people could hope to break the chains that bound them to apartheid-like living conditions and oppressive work situations. Together, civil rights organizations and unions can be proud of their efforts to stand up for those who have been knocked down, to open doors for those who have had doors slammed shut on them, and to speak collectively for those countless millions of individuals who have been rendered speechless.

There has been progress. But as much work as has been done, that is just how much more there is to do in terms of improving the conditions for women and people of color in higher education. Our unions have a role to play in this unfinished business.

WHY IS AFFIRMATIVE ACTION A UNION CONCERN

Unions have always cared about more than just collective bargaining. Unions operate as social, political, educational, and collective bargaining organizations. It has never been in the best interest of unions to pit worker against worker, to promote an underclass willing to work for slave wages, or to do the bidding of greedy corporate bosses. Unions are about improving the quality of life for their members and society as a whole. Unions may not have always acted in an exemplary fashion in terms of inclusion and diversity, but support of these issues represent the higher values that must guide us as we move through these troubled times. If unions are to have a vibrant future, if they are to recapture past glory and influence, they will have to devote greater energy to promoting diversity, protecting affirmative action, and thwarting the efforts of those who would turn worker against worker.

Collective bargaining agreements, like affirmative action policies, operate to negate arbitrary and capricious behavior of employers and their surrogates. Both attempt to:

1. establish policies, rules, and procedures that regularize relationships between employer and employees;
2. reduce the unfair advantages of privileged classes and their race biased institutions;
3. provide hope and a sense of fairness for those who feel hopeless and victimized.

Practiced correctly, affirmative action is a good management tool that widens the net to capture the attention and participation of those who traditionally have been ignored by the "good ole boy system."

UNIONS AND THE POLITICS OF AFFIRMATIVE ACTION

Why should unionists be involved in the politics of affirmative action? In my own union there are many who believe that affirmative action is wroing, that it is reverse discrimination, and that we should leave it alone and get on about the business of bargaining a better contract and improving the working conditions of union members. It is my position that we cannot separate affirmative action from improving the working conditions of union members. As a union we are like a patchwork quilt. Like a quilt, our members are all different -- different races, all sizes and shapes. Separate we may appear ragged, frayed and of not much importance, but stitched together by the bond of unionism we are as strong and beautiful as that quilt held together by very strong thread.

It is no secret that in higher education we have not always seen our faculty of color as members of the family, let alone beautiful. In fact, we have often acted toward faculty of color like some of us might act toward useless scraps of material, seeing them as having no value and therefore, disposable. Higher education will wither and die if we cannot be forward thinking enough to understand that multiple experiences and perspectives invigorates and strengthens us and, like the patchwork quilt, makes us stronger and more beautiful. Affirmative action programs are but one way of insuring that we as a society become more like that patchwork quilt -- strong, warm, functional, and beautiful.

We cannot create a just society or truly great universities if women faculty and faculty of color continue to feel:

1. isolated and marginalized;
2. alone and under siege;
3. victims of subtle racism;
4. like tokens and never taken seriously;
5. under continuous stress.

Whose responsibility is it to step up and create inclusive and nurturing environments where women faculty and faculty of color can feel welcome and valued? Women faculty and faculty of color often are isolated and stressed. Whose job is it to reduce the isolation and stress caused by being the only one in

the glass house? Women faculty and faculty of color often feel that they are the victims of subtle sexism and racism. Whose responsibility is it to stamp out these subtle forms of sexism and racism? Often women faculty and faculty of color feel that they are tokens, not taken seriously, and only tolerated. Whose job is it to reduce the tokenism and create real opportunities for women faculty and faculty of color to be useful and productive members of the academic community?

THE ROLE OF COLLECTIVE BARGAINING

People sometimes mistakenly credit or blame collective bargaining for all they value or find wrong in the workplace. This is a big mistake. Collective bargaining is neither inherently good and useful nor inherently bad and useless. Rather, it is simply a neutral tool which can be used positively or negatively depending on the purpose to which the process is put. If this is the case, and I believe it is, what kind of things can be done in collective bargaining to support sound affirmative action programs that operate to increase diversity? Unfortunately the answer is not as optimistic as we might like.

There is always the problem of agreeing among ourselves that diversity is a goal worth pursuing. There are many of us still influenced by the myth of meritocracy. The notion of merit has become the creed of the middle class. Those of us who have made it have become smug and secure in the belief that our accomplishments are solely self-generated. Is it not true that those who are less fortunate have character flaws. After all, is it not still true that in America merit prevails, and those with drive and commitment can make it? There is really no need for affirmative action, it is reverse discrimination and therefore, un-American.

This logic is as faulty as the reasons many of us use when we claim opponents of affirmative action suffer from "genesis amnesia." By labeling them misguided and not worth our attention, we ignore them at our own peril. They are numerous and powerful enough forces in our organizations to slow down the march toward effective affirmative action efforts. Even when evidence is provided that the elite have always had their affirmative action programs through the form of their "good ole boys" networks, our members remain unconvinced. (Recently, supporters of anti-affirmative action legislation in California were embarrassed by the revelation that some Regents of the University of California, including Governor Wilson, were using their influence to get lesser qualified students accepted into the University). Nonetheless, critics of affirmative action selectively put a Black face on affirmative action while ignoring the allocation of preferential treatment to the privileged.

With all the hue and cry over affirmative action, one would think that African Americans and other people of color are over-running the employment arena. There could be nothing further from the truth. A look at the African American presence in the California State University system quickly dispels such a notion. As of October, 1995, (the latest statistics available) there were but 247 Black men and 172 Black women in full-time faculty positions in a system of

approximately 18,000. The figures are just as dismal among other groups of color as well.

AUTOMATION, COMPUTERS, AND THE DECLINE OF WORK

Jeremy Rifkin and Stanley Aronowitz in The End of Work and The Jobless Future challenge the popular belief that there are good jobs available for all qualified and motivated workers. Their books describe a future where computers and automation have replaced all but a few elite workers. In an attempt to provide a preview for what this future might look like without thoughtful intervention, Rifkin points to the present day condition of the African American male laborer as proof of what is in store for all workers. Automation and the movement of jobs to the suburbs has all but eliminated the young African American male laborer from the workforce. Unemployment for young African American males in many of our urban areas has been consistently in the double digit range for more than twenty years now.

As unionists from higher education, we have a special obligation to frame issues so that the public has an opportunity to understand clearly the nature of the problems before us. It is African Americans, women, and other people of color who are targets now, but we are beginning to see greedy corporate types take aim on middle class European Americans. How many more European American middle managers have to be the victims of corporate outsourcing and downsizing before we get the picture that, as laborers, we are all in the same leaky boat. Some have just gotten wet before others, but without intervention everyone in the boat will soon be treading water.

WHAT THE CALIFORNIA FACULTY ASSOCIATION IS DOING

To address seriously issues of diversity and multiculturalism in a faculty union as diverse as ours is truly a difficult process. If we shift metaphors (away from the patchwork quilt), it is somewhat like a high wire balancing act. You can get into grave difficulty if you lean too far in either direction. This is especially the case when the issue is affirmative action. Despite the fact that the California Faculty Association's Board of Directors voted unanimously to support affirmative action and to work to defeat the California Civil Rights Initiative, there is still a great deal of rumbling from some of the rank and file. Statements such as, "I didn't join the union to support social causes, I joined to protect my working conditions, it is not fair for you to use my union dues to support causes that I do not agree with, or I'm going to quit the union if you don't stop this white male bashing," are but a few of the comments that catch our attention.

Nevertheless, our union has entered the fray and I am proud of our efforts to this point. Unions in higher education must practice what they preach on affirmative action. We can no longer pass glorious resolutions, pat ourselves on the back and consider our work done. We must practice what we preach. Recognizing this, we in the California Faculty Association have embraced diversity

and affirmative action. Not only have we incorporated diversity goals into our by-laws, but we have consistently budgeted funds for events to support and encourage faculty of color to participate in union activities. For example, we fund and support an annual diversity conference, sponsored a Chicano/Latino conference last Spring, and we lead annual promotion, tenure, and retention workshops. Additionally, we have established a staff intern program to create career ladders for persons of color, and this year we will sponsor a leadership conference that specifically focuses on new faculty, women faculty, and faculty of color. In a previous contract we negotiated a $2,500 supplement for newly hired faculty of color to assist with their introduction and adjustment to the university. Unfortunately, this provision of the contract was challenged in court and has not been instituted.

Additionally, CFA's Board of Directors unanimously voted to support affirmative action and to oppose the California Civil Rights Initiative. On April 14, hundreds of my CFA colleagues from across the state came together to march in support of the National Organization of Women's March to Defeat the CCRI. At this very moment our union leadership is preparing a voter registration and education campaign to get out the vote to defeat the CCRI.

As a union we are not perfect on the issues of diversity and affirmative action. It is still a potentially divisive force in our organization. However, despite this threat we continue to support affirmative action because we believe that it is good for our union, the faculty, students and society as a whole. We believe that we are partners in an institution, higher education, that trains future leaders. As such we have an obligation to prepare these leaders to function in an increasingly complex, multicultural and multiracial society. This is best accomplished by placing these future leaders in settings in which they can learn from, and about, those who are different from themselves.

CONCLUSION

I grew up in a union family and have seen both the good and the evil of unions. On the one hand, unions have had a history of racism, cronyism, and sweetheart contracts that have hurt African Americans and other people of color. On the other hand, unions have been good in that they have removed barriers and ceilings and improved the living conditions of their members.

Knowing what unions are capable of, I now see another role for them, and it grows out of my childhood experiences as a butterfly hunter. When I was a kid my friends and I occasionally would go out in the fields to capture butterflies. We would carry along Mason jars and lids to use as our glass prisons for our prey. The trick was to sneak up on the butterflies, get them in the jar and place a lid on the jar. Once we had captured our limit of butterflies, we would sit around and watch the beautiful creatures for what seemed like hours. Initially on capture, the butterflies would try to escape, wildly bouncing off the side of the jar and against the screw top ceiling. However, no matter how hard they hit the ceiling, they could not escape to freedom.

After a period of time I would notice that the butterflies would stop trying to escape. They would no longer bounce off the ceiling. They would just settle at the bottom of the jar and wait. To some extent many of our brothers and sisters in this country are like those butterflies. They have knocked themselves against barriers and ceilings for so long that they have lost the will and energy to continue struggling. They see no hope or future. As unionists, it is our job, our responsibility, to work to remove these ceilings and inject hope. One dose of hope is affirmative action. Another dose, in my estimation, is to use collective bargaining to press for progressive contractual language that embraces diversity and multiculturalism.

LEADERS SPEAK OUT ON HIGHER EDUCATION COLLECTIVE BARGAINING

C. RECENT TRENDS IN COLLECTIVE BARGAINING IN CANADA

Donald C. Savage, Executive Director
Canadian Association of University Professors

This has been a dramatic year for collective bargaining in Canada. Before going into the details, however, I would like to remind you of some of the similarities and differences between collective bargaining for academic staff in Canada and in the United States. The major similarity is the decentralization of the system which is in marked contrast to most European structures. In both countries, collective bargaining takes place at the local level, never at the federal level except for federal institutions such as the Royal Military College at Kingston. There are no province-wide negotiations for university teachers in Canada, although this exists in a number of places for community college teachers.

There are, however, a number of important differences. There is no sharp distinction in Canada between public and private universities. Most universities are private corporations heavily subsidized by the provincial and federal governments. As a consequence university teachers are not civil servants except in the Royal Military College. For the most part they bargain under private sector labor legislation which is much more favorable to the unions than public sector legislation. The major exception is Alberta where faculty bargain according to a special statute which gives bargaining rights to local faculty associations but forbids the right to strike.

Private sector labor legislation in Canada allows the parties to bargain about anything they wish so long as it is not illegal under another statute. One cannot legalize pot by collective bargaining. There are, however, no rules that make some subjects mandatory, permissive or off-limits for the bargaining process. One faculty association created the university senate through its collective agreement. Others have created faculty councils. Most entrench the system for appointments, tenure, and promotion, not to mention professional ethics, patents, copyright, performance indicators, as well as the usual economic issues.

Furthermore, labor boards and the courts in Canada have expressly rejected the principles involved in the Yeshiva judgment in the United States and have

refused to consider faculty as managers. There have been two key tests. Labor boards recognized that the area in which faculty members exercised least influence is in the preparation of university budgets and obtaining of funds. In this important aspect of university decision-making, traditional bureaucratic as distinct from collegial arrangements prevailed. Nowhere is this clearer than in the case of financial exigency as the Labor Relations Board in New Brunswick recognized in the certification of the University of New Brunswick. In addition labor boards in Canada also recognized that faculty co-ordinate rather than manage in their collegial academic roles even if in coordinating they exercise leadership and have substantial influence.[1]

The consequence is that far more faculty are covered by collective agreements in Canada than in the United States. Currently 46 of the 71 universities in Canada are certified under labor legislation. In addition, seven are voluntarily recognized under labor law which gives the bargaining agents essentially the same power. There are five universities in Alberta covered by special legislation which gives them bargaining rights but not the right to strike. Thirteen are uncertified.

On the other hand, provincial governments are much more willing to legislate to interfere with collective agreements or with the bargaining process than appears to be the case in the United States. This usually involves various forms of legislated wage freezes, although in Nova Scotia the provincial government has frozen all collective agreements for the twelve universities in the province for three years.

A final difference is that there is only one national federation of university faculty unions in Canada, namely the Canadian Association of University Teachers. The CAUT has formed a sovereignty-association with La Federation Québécoise des professeures et professeurs d'Université which represents all the universities in that province. CAUT also has a working agreement with the College-Institute Educators' Association of British Columbia which represents the majority of community college teachers in that province. This means that there are not competing national faculty unions.

I. EVENTS IN THIS ACADEMIC YEAR: THE POLITICAL BACKGROUND

The events of this academic year must be seen against the background of drastic financial cuts at the federal level as well as by some of the provinces.

Since World War II the federal government in Canada has heavily funded postsecondary education, health and welfare through transfer payments to the provinces. The transfer payment used for higher education at its peak came to $2.482 billion in cash in 1993/94. The wave of neo-conservatism in Canada has persuaded the federal Liberal government to drastically reduced these financial commitments and to abolish whatever tenuous suggestions existed previously that the money should actually be spent on postsecondary education. Transfers from

the federal government to provinces or states are extremely vulnerable to cuts because, in the first instance, the only victims are other politicians at the provincial level. The general public simply does not understand either the complexity of the financial structures involved or, more particularly, that these relatively arcane accounting arrangements mean eventually reduced accessibility to higher education, undermining of the medicare system, and less spending on welfare. I can understand why the Republicans in Congress want to copy the Canadian system by transforming specific federal programs into block transfers to the states. Having been there, I can give you one word of advice -- don't.

We do have some specific federal programs in Canada -- research funding for higher education, student aid, aid to First Nations education, and funding for the Royal Military College. However, until recently, the transfer payments made up about 50 percent of all federal expenditures on higher education.

The rapid decline in federal transfers has seriously affected the ability of provinces to fund higher education. In addition the voters have put in power a number of ultra-right wing governments, notably in Ontario, Manitoba, Alberta and Nova Scotia. This combination has resulted in significant cuts to universities and colleges. In Ontario, for example, the new Conservative government cut the funds for universities by 16 percent. This appears to be only the beginning. Eight of the ten Canadian provinces have balanced their budgets -- only the two largest have not, namely Ontario and Quebec. However, the Conservative government in Ontario has promised a 30 percent tax cut which can only be realized by further substantial cuts to education, health and welfare. The Parti Québécois government under Lucien Bouchard is promising several years of harsh austerity in order to reduce its deficit. The New Democratic Party government in British Columbia, however, has decided not to pass the federal cuts along to postsecondary education and health. They are in a position to do this because British Columbia has the most vibrant economy of any part of Canada.

II. THE COLLECTIVE BARGAINING RESPONSE

(a) The Spread of Collective Bargaining

The first great surge of collective bargaining for university academic staff came in the 1970's when the market for professors and librarians changed from a sellers to a buyers one. Since then there has been a steady spread of collective bargaining. This meant that by 1994 all the faculty associations in Quebec were certified except McGill. Outside of Quebec, 31 faculty associations were certified under provincial labor legislation involving 50 percent of the academic staff. There are special arrangements already noted in Alberta.

It appears likely that the current economic malaise will stimulate the second major wave of certifications outside of Quebec. Generally speaking the largest and richest English-language institutions have resisted certification. This year one of them, Queen's University, has certified and is negotiating its first collective

agreement. The major engineering university in Canada, the University of Waterloo, is on the verge of certification. If this particular certification goes forward, I would expect several more. This would make Canada a country where the vast majority of university academic staff are covered by collective agreements under labor legislation.

(b) A New Militancy by Some Employers

The difficult economic situation has encouraged some university employers to launch a counter-attack on faculty collective bargaining. This has taken several forms. In the first place, some university vice presidents (administration) have seen this as a golden opportunity to take over effective running of their universities on the grounds that they understand economic matters and the academic administration does not. This agenda is sometimes combined with an ultra right-wing political credo. The nub of the right-wing argument is that universities should be run like any other corporations and that the major obstacles to this are collegiality, tenure and collective bargaining.

One focus of the employer counter-revolution has been the articles in collective agreements dealing with financial exigency and redundancy. In general such employers want to weaken these articles since they see themselves as the hatchet men or women of the provincial governments, not as academic leaders who believe that there is a special university enterprise to be defended. Some also think that macho bargaining of this type will lead to more prestigious appointments in other universities. The more extreme in this party want to so transform financial exigency and redundancy articles so that they would allow the university to lay any individual off without having to establish a genuine financial crisis or offer any other reason. This amounts to the abolition of tenure by the back door and was the central issue in the strike at the University of Manitoba last fall.

The business officers collectively have also tried to lead the charge against tenure more directly. Their national magazine has featured anti-tenure material, regularly sings the praises of privatization, and supports the advance of anti-labor American institutions into Canada. Fortunately the presidents have so far undercut them. Five of the key Canadian university presidents recently appeared on the Canadian Broadcasting Corporation to discuss university issues. In the course of this program they delivered a rousing defence of tenure. This has somewhat cooled the debate for the moment. Furthermore, there is evidence that the national organization representing university presidents is anxious to ensure a common lobbying voice for the university community in the federal arena. We cannot afford the luxury of competitive lobbying, given the gravity of the current financial situation.

(c) Anti-Bargaining Moves by Provincial Governments

A number of Canadian provincial governments have tried to undercut collective bargaining in general. Where they have succeeded, they have, in the

process, eroded the bargaining position of faculty. In Ontario the new Conservative government amended the labor relations legislation to make certification more difficult and to place a variety of other barriers to effective unionization. In Alberta the Conservative government originally threatened to abolish tenure but backed off eventually and decided that it would instead require all universities in the province to negotiate financial exigency and redundancy articles in their agreements. A variety of Canadian governments, both federal and provincial, have over the past few years passed laws freezing or rolling back wages in the public service and have normally included the universities within the ambit of such legislation. The most egregious of these has been Nova Scotia where collective agreements have been frozen by legislation for the better part of five years.

The labor movement has responded to these moves by appealing to the International Labor Organization. CAUT had some success in doing this in British Columbia some years ago. The ILO condemned the removal of bargaining rights for faculty in that province, and the New Democratic Party restored those rights as soon as it came to power. The ILO has also condemned the provisions of the legislation in Nova Scotia. So far CAUT and the local faculty associations have not been able to exploit this to much advantage.

(d) A New Militancy by Academic Unions

At the beginning of this academic year, matters came to a head at the University of Manitoba in Winnipeg. Manitoba is a large multi-faculty university with 1,132 faculty and 25,000 students, equivalent in function to a state university in the United States. It certified in the early 1970's. It has had a normal bargaining relationship since then. It experimented for a while with forced choice arbitration but the administration abandoned this process because the union won too frequently. Until this year it had never had a strike.

The Province of Manitoba is governed by the Conservative Party which is no friend of collective bargaining, particularly in the public sector. The province is also one of the have-not provinces in the Canadian federation.

It also had a lame duck president, which allowed the vice president (administration) to take charge of the bargaining process. He characterized the union leadership to one reporter as Marxist and was rumored to have close connections with the right wing members of the board of governors and of the provincial government. The administration did not believe that the faculty would ever go on strike, partly because the association had tried and failed two years previously. The administration, therefore, thought that it could gut the contract with impunity. It decided to use two devices. One was to stall negotiations so that the contract would lapse. Under the legislation in Manitoba, once a collective agreement has come to an end, it continues until there is a strike or lockout but only for twelve months. The other tactic was to propose financial exigency and redundancy arrangements that were so outrageous that it would be impossible for the union to accept. Generally speaking, every time the union agreed to something

at the bargaining table, the administration would simply table a worse offer in the next session. On financial exigency the administration demanded an unlimited layoff power without restrictions or meaningful procedures.

The consequence was a three week strike in the fall which paralyzed the university and was about to result in the cancellation of the autumn term when a settlement intervened. The strike was sustained far beyond anything thought possible by the administration, partly because of the issue involved and partly because CAUT has a fairly substantial strike fund to assist both individuals and the union. The new agreement built an elaborate academic process into the financial exigency and redundancy articles and thereby constrained the power of the board.

Meanwhile the administration at Memorial University in Newfoundland and Mount Allison University in New Brunswick also pushed their associations to the brink. Memorial is the only university in Newfoundland and has 867 faculty and 17,000 students. Mount Allison is a widely respected liberal arts college. In Memorial the administration had from the beginning of negotiations determined to have a confrontation. It broke off negotiations after a couple of days of talks, treated the conciliation process with contempt, and then announced that since the collective agreement had lapsed, it would impose an administrative handbook of its own which it had prepared prior to the conciliation process if not earlier. This attack of hubris was a grave error from their own perspective, because it gave the union the issue around which it could organize a successful strike ballot.

Subsequent to the Manitoba strike, the administrations at Memorial and at Mount Allison were persuaded that it would be wise to settle since similar strikes had been authorized by the members in those institutions.

The failure of the war party in these three institutions appears for the moment to have cooled the ardor of others of that persuasion elsewhere in Canada. All twenty universities in Ontario are currently negotiating since the wage freeze in that province has come to an end. It would appear so far that hard but not unfair bargaining has been the order of the day for most of them, although there are signs that Carleton University plans to emulate the tactics of Memorial. By September we will know whether the normal bargaining process has occurred, or whether Ontario university administrations will be tempted by the right-wing agenda. The results will be very important for the future of collective bargaining in Canadian universities.

Finally, you may be interested to know that the faculty association at the Royal Military College secured a collective agreement this year for the civilian faculty. The college is under federal labor legislation which allowed the membership to choose arbitration rather than the strike mode. It did so. The Treasury Board refused to negotiate seriously and virtually the whole contract went to arbitration. This is a scary process, but the association, represented by CAUT legal staff, won on virtually every point at issue, and, among other matters, the members became the only federal civil servants with the legal right to criticize publicly their employer.

In conclusion, from the point of view of faculty associations in Canada, it is both a time of peril but also a time of militancy. Historians are taught not to predict the future, and I will adhere to my training. Suffice it to say, my successor as executive director of CAUT will have the privilege of riding the tiger.

REFERENCE

1. See for instance, The Faculty Association of Vancouver City College (Langara) and Vancouver City College, British Columbia, May 22, 1974.

LEADERS SPEAK OUT ON HIGHER EDUCATION COLLECTIVE BARGAINING

D. REFLECTIONS UPON 25 YEARS OF FACULTY UNIONISM

Arnold Cantor, Former Executive Director
Professional Staff Congress, CUNY

As I was trying to decide how to open my presentation today, I was reminded of how one of our illustrious New York State Governors opened his address to a group of inmates at the state prison which was then known as Sing Sing. He started his remarks by saying, "I can't tell you how glad I am to see so many of you here." Although the listed title of my address is "25 Years in Academic Unionism," I actually have been involved with teacher unions for 40 years. What I have to say today will reflect some of my experiences and what I have learned from them over that span of time. Actually, what I have prepared is more in the nature of a "Fireside Chat." I hope you will forgive any informalities which may creep into my text.

Although, quite obviously, I am and always will be a union advocate, I hope that what I have to say will be of some value to those of you who represent management. I shall try to avoid the pitfalls of standing before you and boring you with a series of reminiscences about my many great accomplishments. What I have set out to do is to make some important points relative to collective bargaining in general, and to collective bargaining in higher education in particular. I expect that there will be nothing startlingly new that you have not heard before, but I am hopeful that you will carry away some reinforcements of important concepts that will advance the process in which most of us are engaged. I will be using some worn out cliches and I will also probably offend some of you before I am through, but please understand that it is not my intention to offend anyone. I am stating these disclaimers up front because, based on experience, they are needed. It is no accident that I rarely get invited back to speak.

Those of you who know me and have worked with me will readily agree that I am, by nature, laid back and humble. In fact, it is that humility which caused me difficulty in responding to the many tributes I received at several receptions and parties in honor of my retirement as Executive Director of the

Professional Staff Congress. I realized that all those nice things that were said about me were absolutely true.

Someone once said, "Believe in what you do. Do what you believe in." I think those are very important concepts. I have been very fortunate in my professional life to have been able to believe in what I was doing and to do what I believe in. For example, I believe passionately that teaching is, indeed, the noblest profession. I also believe that collective bargaining, along with other important professional activities, is the best way for teachers to participate in the educational process in order to deliver the highest quality of education and services to their students. But while the collective bargaining process has the potential to benefit all who are members of a collective bargaining unit and their employer, it is abundantly clear to me that those who would be leaders, either on the union side or the management side, in order to do their jobs well, must possess certain characteristics which are not common to everyone. If the process is to work for the mutual benefit of the parties, the relationship between the parties must be built on trust. The personal and professional integrity of the individuals responsible to their constituencies must be beyond reproach. Although there may be at times, and probably will be, vehement disagreements on issues, the integrity of the leaders on both sides must be part of the foundation of a productive collective bargaining relationship. It is important to understand that "adversary" in our work is not a synonym for "enemy." Professional differences of opinion should, in my judgment, not be personalized, but should stay focused on the issue or issues. It is important that those who are, by the nature of the collective bargaining process, adversaries have an understanding of where the other side is coming from, and if possible, even where the other side is going. That understanding should help the parties work constructively together and to keep disagreements on a professional rather than a personal level. But, as I have stated, the leaders on both sides must have confidence in the basic personal and professional integrity of those they are dealing with in order for the process to work. Because the parties are frequently representing opposite view points on what may be very important issues, there will almost certainly be occasions when one side criticizes the other, both in private and in public. In my opinion, there is no room for "thin skin" on the part of individual leaders on either side. If the understanding of each other's responsibilities and goals related to those responsibilities that I spoke of exists, then criticism, either in private or in public, within certain bounds, of course, should not be the cause of acerbity in the relationship.

I offer as an example of a relationship built on trust, my experience as president of the Rochester Teachers Association. When I felt the need to publicly criticize the Superintendent of Schools on a particular issue or action, I would call him on the telephone and tell him that the next day I was going to release a statement to the media saying something nasty about him. I would also explain to him why I felt compelled to do so. Sometimes I would tell him that the reason was just that I felt the need to rally the troops or to get more members. He would frequently extend the same courtesy to me when he was going to criticize me or my organization. While neither of us enjoyed being attacked in the media, we both had an understanding of what we were about and consequently there was never a

hostile exchange between us, either privately or publicly, about our criticisms of each other. At the other end of the "understanding each other's position" scale, two entire meetings between a certain chief administrator at a certain university and the leaders of the faculty and staff union at that university were spent on the administrator's berating of the union leadership about how frequently the union's newspaper attacked or criticized the administrator. The union leaders responded by researching back issues of the paper in order to prove that there were relatively few such articles. I submit to you that the administrator was wrong for having too thin a skin and the union was wrong for spending the time and effort to defend itself against the charge. But, the significant point here is that the collective bargaining relationship is built on shaky ground.

Another essential characteristic for leaders in a successful collective bargaining relationship, in my judgment, is understanding leadership itself and knowing how to be a leader. Even a peripheral study of history teaches us that individual leaders -- personalities -- have driven important events both for good and for evil throughout the history of mankind. Leadership, in my judgment, frequently requires a high profile, a willingness to take risks, a thorough knowledge of the field in which one is working, a high degree of sensitivity to other people, and, of course, intelligence.

Wearing my union hat, I am convinced that individual members of a union expect their elected leaders, in addition to protecting and enhancing their terms and conditions of employment, to say and do things that they would like to say and do but cannot or will not do because of perceived or actual threats to their own job security or professional future were they to speak out or act out as an individual. Put another way, union members expect their elected leaders to have courage and to be willing to speak strongly on their behalf as issues arise. In addition, they expect their elected leaders to show imaginative leadership by occasionally blazing new trails. They also expect their elected leaders to give them guidance and direction by taking positions on important and sometimes difficult issues. These expectations sound like a big order, and they are, but there have been many who have filled the order and, alas, there also have been many who have not.

Leadership on the part of managers is more difficult to describe, primarily because they typically have to march to a drum beat dictated to them by a board of trustees and/or a mayor or a governor or a county executive. Good managers, who are successful leaders, are those who are able to stand up for what they believe in without alienating their bosses -- especially when their bosses are moving in what they consider to be the wrong direction. Allowing for the difference in the nature of their jobs, managers, I believe, in order to be leaders, need to have much the same qualities as those I have described for union leaders. I suspect that you will agree that strong leadership can be defined in pretty much the same terms for almost any endeavor.

When strong leadership is present, people will follow it. For example, when the Legislative Conference and the United Federation of College Teachers decided to stop fighting each other for the right to represent the instructional staff at The

City University of New York by getting together and forming one organization in 1972, it was the strong leadership of Belle Zeller, Israel Kugler, Albert Shanker, and others that made it possible. Developing the terms of the merger for two bitter enemies was a Herculean task, especially when you consider that one was affiliated with the National Education Association and the other with the American Federation of Teachers, AFL-CIO. That merger, which created the Professional Staff Congress, as you know, is alive and well today.

When the Professional Staff Congress helped to actually write and to get passed the CUNY Governance Bill in 1979 which maintained the University in all its parts and committed New York State to fund its senior colleges, it was the strong leadership of President Irwin Polishook and the New York State United Teachers working closely with Chancellor Robert Kibbee which made it happen. This landmark legislation came as a result of the City's fiscal problems in the mid 1970's, and at a time when others were arguing for the breakup of the University into separate institutions with the closing of some and the separation of the community colleges from the senior colleges. The presidents of City, Brooklyn, Hunter, and Queens colleges went to Albany during those stressful times asking that their colleges be brought into the State University and suggesting that the other senior colleges at CUNY be closed.

President Sean Fannelli of Nassau Community College, in my opinion, along with Phil Nicholson, President of the Nassau Community College Federation of Teachers, continue to exhibit strong leadership by standing up against attempts at censorship and invasions of academic freedom. By the way, John Silber of Boston University and his protege at Adelphi University are examples of strong leadership which I recommend not be emulated. Victor Gotbaum, then of District Council 37, Albert Shanker, then of the United Federation of Teachers, Felix Rohayten, representing the banking community in New York City, and many others exhibited extraordinary leadership in putting together the fiscal plan to keep New York City afloat during its extreme financial difficulties which I will discuss a little later. I have mentioned only a few examples of leadership with which I am familiar. I am sure there are many more.

I believe that labor relations is a discipline and that those who are working in the field need to be well versed in it. There seems to be an attitude in some places that anyone can handle the job, and that certainly if the person is a lawyer he/she must be competent. While there are notable exceptions, lawyers may be the poorest choice to be in charge of labor relations. Among the developments in our work that makes me uncomfortable is an over dependence on lawyers by both sides. Even more troublesome is the fact that many of the management appointed lawyers are not labor lawyers by training and experience. Most of us would not want an opthamologist removing our appendix, but it seems that any kind of lawyer is acceptable by some to do labor relations. Competency in this field requires not only knowing the applicable laws, but also having a thorough knowledge of the collective bargaining agreement, a knowledge of the history of labor relations, and, most importantly, a thorough understanding of the collective bargaining process. This is not a win or lose process such as prevails in litigation, but rather it is a

process of mutual agreement and of compromise. We need competent labor lawyers to be available to both sides as consultants, but I prefer that they not be at the table. Also, experience has taught me that whenever you go to court, no matter how strong you feel your case is, it is a "crap shoot." We are generally much better off to use the collective bargaining mechanisms of negotiation or grievance and arbitration or even mediation to settle disputes. While on the subject, let me say that confrontation is a technique to be used only sparingly and in conjunction with specific goals. I am of the opinion that union leadership can accomplish more for their members if their relationship with management is basically non-confrontational, but rather characterized by mutual trust and a genuine concern for the enterprise. But the key word here is mutual. In order to survive, such a relationship must be reciprocal so that both sides benefit.

Another quality which I believe is very desirable, but perhaps not absolutely essential in carrying out the responsibilities of representing a constituency is a sense of humor. It is certainly true that my sense of humor has gotten me in trouble more than once, but, overall, I think it has served me and the people I represented very well. I believe it is healthy and even character building to be able to laugh at one's self and at situations without offending or hurting others. Not very long ago we were in a negotiating session which was making no progress and was becoming more and more heated in the exchanges between the parties. I decided to try to break the tension before it exploded by telling the following joke: Did you hear about the flasher who walked up to the little old lady in the garment district and pulled open his coat and she looked up and said, "you call that a lining?" It broke the tension and the meeting became profitable for both sides.

I told my favorite lawyer joke at a large dinner party a few years ago and one of the trustees who is a lawyer became so angry he called me a few choice names and refused to speak to be for an entire year. But the joke is a good one and in case you have not heard it, here it is: Research scientists have discovered that lawyers make better subjects than white rats for laboratory experiments for three important reasons, 1. lawyers are in more plentiful supply, 2. laboratory technicians are less likely to become attached to lawyers, and 3. there are certain things that rats will not do!

One of the most exciting happenings in my career took place in 1975 and 1976 when New York City was in a *de facto* bankruptcy situation and could not pay its bills because it could not sell its paper on the open market. The municipal unions formed a coalition and agreed to bargain with the City as a coalition with the idea that a single round of negotiations would be better for the City than having to conduct negotiations separately with each union. It was an historical event and it did result in all of the unions accepting similar agreements with some givebacks and very modest salary increases. More importantly, the unions agreed to make available, temporarily, large amounts of money from their retirement systems in order to keep the city afloat. The forming of the coalition of municipal unions was a key ingredient in bringing the banking community into the overall negotiations to save the city which resulted in a plan which worked. Although neither the

University nor the state wanted the Professional Staff Congress to be part of the coalition, we forced our way in mainly because the other unions welcomed us. There were many interesting and unusual events during the coalition bargaining meetings, but perhaps the most unusual involving the PSC took place after the negotiations were completed.

The PSC agreement with CUNY contained salary schedules for each rank with salary steps known as increments paid annually until one reached the top of the schedule. These increments were in addition to any salary raises negotiated. When the coalition agreement was concluded it contained, in addition to some sacrifices by the unions, very modest salary increases as has been stated. When the negotiated coalition language was applied to the PSC-CUNY contract it did not negate the annual salary increments in addition to the very modest raises. Of course, we were aware of that and we assumed that the City was also.

At approximately 5 p.m. on the day before the unions and the City were to sign off on the agreements we received a call from the then Deputy Mayor, Basil Patterson, who, incidentally, was a good person and well-liked by the unions, (I suspect that that is why he is no longer in politics) informing us that the City just realized that what they had agreed to involved several annual salary increments for our people and that the City did not intend to pay them. We responded by stating that we assumed the City's negotiators knew what they had agreed to and that we had already informed our members of the agreement and that we were not willing to give up the increments. A meeting was hastily called in Deputy Mayor Patterson's office. At that meeting one of the strongest demonstrations of union solidarity I have ever seen took place. Victor Gotbaum, who was the spokesperson for all of the municipal unions took the position that an agreement was reached by all of the parties, and that the City could not now change it for one of the parties. Albert Shanker took the same position on behalf of the United Federation of Teachers. The City maintained its position that they had not realized that the CUNY/PSC agreement provided annual increments above the salary increases and were not prepared to pay them. The parties were apparently at a very serious impasse. The City was refusing to pay the increments and the PSC, with the support of the other unions was refusing to alter the agreement. What happened then you will find hard to believe, and I am not sure if it has ever been told before. President Shanker had assigned his top assistant, Bill Scott, to stay with us at City Hall to help us see this problem through. Mr.
Scott and Deputy Mayor Patterson went into private session and emerged about an hour later with the following plan.

Mr. Scott and Deputy Mayor Patterson would each draw a card from a deck of cards, and if Deputy Mayor Patterson drew the higher card, the PSC would agree to give up the increments. But, if Mr. Scott drew the higher card, the City would pay the increments. We looked at them incredulously, and were about to voice our strong objections when Bill Scott gave us what I would characterize as a "knowing" look. We then agreed to the proposition. Someone shuffled a deck of cards and Deputy Mayor Patterson drew a card and it was a King! Bill Scott then drew a card and it was an Ace! And the parties lived happily ever after.

My concerns for the future of academic unionism include a strong desire to see the American Federation of Teachers and the National Education Association get together and become one organization and that an accommodation be worked out for close cooperation between this new organization and the American Association of University Professors. I would also wish that a way be found to negate the 1980 decision of the Supreme Court on Yeshiva University so that academic unionism in the private sector can get back on track. I want the remaining states to pass enabling legislation. And, I think that it is high time for the colleges and universities, working with their faculties and staffs, to get the word out that our higher education system is the best in the world. It is among our country's most precious possessions and therefore deserves to be adequately funded.

II. ARBITRATION AND GRIEVANCE PREPARATION

A. Compulsory Arbitration of Discrimination Claims Under Collective Bargaining Agreements

B. Arbitration in Faculty Higher Education

C. Grievance Preparation form the Union Perspective

D. Grievance Preparation: A Management Perspective

ARBITRATION AND GRIEVANCE PREPARATION

A. COMPULSORY ARBITRATION OF DISCRIMINATION CLAIMS UNDER COLLECTIVE BARGAINING AGREEMENTS

Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown, and Joy
Boston, MA

A. INTRODUCTION: THE RELATIONSHIP BETWEEN STATUTORY RIGHTS AND ARBITRATION

The passage of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 along with many state statutes banning discrimination created important protections for millions of American workers. For the first time employees who were terminated and believed the decision was tainted by discriminatory motives could sue in federal or state court to get their jobs back.

But for those employees covered by collective bargaining agreements, the enactment of the new state and federal laws created alternative routes to remedy biased decision-making. Most unionized workers, protected by just cause provisions or anti-discrimination clauses in their collective bargaining agreements, already had the right to grieve their dismissals to binding arbitration. The new statutes said nothing about arbitration proceedings and their effect on employees' rights under the statutes.

Not surprisingly, then, cases dealing with the procedural relationship between arbitration and the remedial processes of the new statutes began to arise. Employers argued that since unionized employees had access to arbitration procedures which resulted in binding decisions, then they should not also be allowed to file discrimination suits in state or federal court over the same issues. Or, at the very least, if the employees had had their cases heard before an arbitrator and lost, then that arbitration award should bar relief in court.

These arguments came to a head and were seemingly resolved in 1974 when the Supreme Court issued its decision in Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Case 81 (1974). In Gardner-Denver, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to a collective

bargaining agreement was precluded from subsequently bringing a Title VII action for discrimination. The Court ruled that an employee who had exhausted the grievance procedure could indeed bring a Title VII action to court. In deciding this case, the Court essentially held that collective bargaining agreements do not require employees to submit statutory claims to grievance procedures. The purpose of the grievance procedure, the Court found, was simply to resolve contractual disputes arising out of the collective bargaining agreement itself. The Court wrote:

> In submitting his grievance to arbitration an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. 415 U.S. at 49-50.

The Court also referred to the limited experience of a labor arbitrator to resolve statutory claims and the fact that arbitration is based on "the law of the shop, not the law of the land" and may be influenced by the interests of the union pursuing the grievance rather than the interests of the individual. 415 U.S. at 51-53.

The Supreme Court also found in subsequent cases that labor arbitration awards would not preclude federal civil rights suits under 42 U.S.C. § 1983 that are based on the same factual circumstances, McDonald v. West Branch, Michigan, 466 U.S. 284, (1984), or claims under the Fair Labor Standards Act, Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 24 WH Cases 1284 (1981).

The effect of Gardner-Denver was that employers would face the prospect of defending their actions in arbitration, perhaps prevailing and then having to still defend their actions all over again in a judicial forum.

This led to some creative work at the bargaining table. A number of employers, including many colleges and universities, sought to limit the number of bites at the apple by limiting the employee's access to arbitration. Thus, a number of so-called "duplicative proceedings" clauses began to make their way into collective bargaining agreements. A typical clause like this would provide that the employer would have no obligation to process a grievance to arbitration if that employee had filed charges with state or federal discrimination agencies or had filed any judicial action. At the very least, it appeared such clauses would limit the number of times the employer would have to defend itself for the same set of events.

The clauses were hardly foolproof, and situations developed where employers would still face multiple forums. Oftentimes, employees would simply wait longer to file their charges with the agencies. An employee could process a case to arbitration, get a decision and still have time, in many cases, to file charges with the agencies afterward.

But then to make matters worse for employers, even these watered-down clauses came under attack on the grounds that they penalized employees for pursuing their statutory rights. In EEOC v. Board of Governors of State Colleges & Universities, 957 F.2d 424, 58 FEP Cases 292 (7th Cir. 1992), the Court agreed with the EEC that such duplicative proceedings clauses were themselves violative of the very discrimination statutes to which they referred. The Court found that by terminating or precluding the grievance procedures "in the event the employee seeks resolution of the matter in any other forum," the employee would be retaliated against for pursuing a statutory right. The EEOC argued, and the Court agreed, that the employee ends up losing a contractual benefit -- the right to grieve -- as a result of his or her decision to file a charge, complaint or lawsuit because of age (or some other protected status). In unambiguous language, the Court concluded:

> A collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA. Nor may the Board successfully argue that unions be permitted to waive an employee's rights under the ADEA, for it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining." 957 F.2d 424, 431.

Thus, a reading of this case, coupled with Gardner-Denver seemed to make it clear that not only could an employer not restrict an employee from pursuing statutory rights under Title VII or the ADEA but the employer and union could not restrict a grievance from going to arbitration if the employee pursued those statutory rights.

B. THE GILMER DECISION AND REGURGENCE OF ARBITRATION

Gardner-Denver and its progeny certainly downplayed the value of arbitration in bias cases. However, in 1991 the role of arbitration in discrimination suits was elevated in status as a result of the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 55 FEP Case 1116 (1991). In this case, the Court held that it would enforce a compulsory arbitration clause found in a securities registration agreement that an employee signed as a condition of employment such that a former employee's claim of age discrimination had to be submitted to arbitration instead of the courts.

Plaintiff Gilmer was employed by Interstate/Johnson Lane Corporation as a manager of Financial Services. As required by his employment, Gilmer had to register as a securities representative with the New York Stock Exchange. Among other things, his registration application provided that he "agreed to arbitrate any dispute, claim or controversy" arising between him and Interstate, including "any controversy...arising out of employment or termination of employment..."

When Gilmer was fired six years later at the age of 62, he filed age discrimination charges with the EEOC and subsequently in U.S. District Court. In

response to the complaint, Interstate filed a Motion to Compel arbitration of the ADEA claim, relying on the clause in the registration application and the Federal Arbitration Act. The District Court, relying on Gardner-Denver, refused to grant the motion but the Fourth Circuit reversed finding "nothing in the text, legislative history or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." 895 F.2d 195, 197.

In analyzing the case, the Supreme Court began by reviewing numerous cases in which it had found enforceable arbitration agreements relating to claims under the Sherman Act, the Securities Exchange Act of 1934, the civil provisions of the Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1933. The Court noted that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum." Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 628 (1985). It then said the burden in this case should be on the plaintiff, Gilmer, to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims.

Gilmer raised several points to meet this argument. First, he argued that the ADEA was designed not only to address individual grievances but also important social policies, namely the prohibition of age discrimination. Arbitration would not be able to address these social policy considerations. However, the Court found nothing inconsistent between those policies and enforcing agreements to arbitrate age discrimination claims.

Second, Gilmer contended that arbitration would undermine the role of the EEOC in enforcing the ADEA. The Court was unpersuaded, emphasizing that an "individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." 55 FEP at 1120. In addition to noting that the agency can still investigate, the Court observed that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes," and that such disputes could certainly be settled without any EEOC involvement.

Third, Gilmer argued that compulsory arbitration was improper because it deprived claimants of the judicial forum provided for by the ADEA. The Court disagreed and stated Congress did not explicitly preclude arbitration or other nonjudicial resolution of claims.

Fourth, Gilmer raised a host of challenges to the adequacy of arbitration procedures, claiming that arbitration panels would be biased; that the discovery allowed in arbitration would be more limited than in court; that written decisions would not be required in arbitration, "resulting, Gilmer contends, in a lack of public knowledge of employer's discriminatory policies, an inability to obtain effective appellate review and a stifling of the development of the law." The Court rejected all these arguments.

The Court also rejected his arguments that arbitration remedies would be inadequate or that there is often unequal bargaining power between employers and employees.

Finally, Gilmer vigorously asserted that the Court's decision in Alexander v. Gardner-Denver Co., precluded arbitration of employment discrimination claims. The Court, while not wholeheartedly embracing Gardner-Denver and the line of cases that had followed, found distinctions between the two cases. First, Gardner-Denver and related cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather those cases involved "the quite different issue" of whether arbitration of
contract-based claims precluded subsequent judicial resolution of statutory claims. The Court wrote:

> Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory action. 55 FEP at 1123.

The Court also noted that since the claimants in those cases were represented by unions, "an important concern was the tension between collective representation and individual statutory rights, a concern not applicable to the present case."

Lastly, the Court stated that those cases were not decided under the FAA, which reflected a liberal policy favoring arbitration agreements.

Following Gilmer, numerous courts upheld arbitration clauses involving discrimination claims. In Peter P. Nghiem v. NEC Electronics, 25 F.3d 1437 (9th Cir. 1994), for example, the Ninth Circuit held that Title VII claims of race discrimination were subject to arbitration. The plaintiff had signed an employment agreement that did not contain an arbitration clause. But a subsequent company handbook did contain a problem resolution process for employee complaints that did culminate in "final and binding" arbitration.

In Mayes v. Smith Barney 1995 U.S. Dist. LEXIS 11881 (S.D.N.Y. 1995), the court found that employment documents which the plaintiff signed at orientation provided adequate notice of the company's arbitration policy and therefore Title VII claims had to be submitted to arbitration.

See also Stromberg v. Howe Barnes Investment, 1995 U.S. Dist. LEXIS 8478 (ND ILL. 1995) (Motion to Compel arbitration was granted; sexual harassment suit barred); Kinnebrew v. Gulf Insurance, U.S. Dist. LEXIS 19982 (ND Tex. 1994) (binding arbitration enforced; arbitration provision was contained in Arbitration Policy which each employee was sent); Larry Lang v. Burlington Northern Railroad, 835 F.Supp 1104 (D. Minn. 1993) (Arbitration language in employee manual enforced by court); Williams v. Cigna Financial Advisors, 56 F.3d 656 (5th Cir. 1995) (arbitration enforced on ADEA claim; arbitration provision contained in Uniform Application for Securities Industry Registration);

Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (Title VII claim to be handled in arbitration); Pritzker v. Merrill Lynch, 7 F.3d 1110 (3rd Cir. 1993) (ERISA claim); Fletcher v. Kidder, Peabody & Co., 81 N.Y.2d 623 (race and gender under New York Human Rights law) cert. denied 114 S.Ct. 554 (1993); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 58 FEP 178 (9th Cir. 1992); Willis v. Dean Witter Reynolds, 948 F.2d 305, 57 FEP Cases 386 (6th Cir. 1991).

In a recent case, Townsend v. Smith Barney Shearson, (DC WNY, 11/2/95), the Court ruled that a claim of sexual harassment by a secretary had to be processed to arbitration rather than the courts. The employee when hired had signed a U-4 form, a document used by the securities industry by every prospective broker/dealer employee registering for membership in any securities exchange or other organization. The form included an agreement to arbitrate any dispute, claim or controversy that might arise out of employment.

The plaintiff sued her employer under Title VII charging that Smith Barney had subjected her to sexual harassment and retaliation because of her sex. Smith Barney asked the Court to compel arbitration and stay the litigation pending the results of arbitration.

The Court wrote that "it is now well-established that Title VII claims may properly be ordered to arbitration when they are covered by a valid arbitration agreement."

In Pitter v. Prudential Life Insurance, (DC ENY, 11/20/95), also recently decided, the Court granted summary judgment to the employer and dismissed a race discrimination claim pending arbitration. A similar U-4 form was in question. The Court cited Gilmer in support of its position that Title VII claims were indeed appropriate for resolution through arbitration. The Court observed that "although the Second Circuit has not ruled on the question of whether civil rights claims under Title VII are subject to arbitration, virtually every other circuit court to consider the issue has reached the same result as Alford (a 1991 decision by the Fifth Circuit which applied Gilmer to Title VII claims). The Court continued:

> Any doubt as to Congress' willingness to allow arbitration to address statutory discrimination claims was put to rest by Section 118 of the Civil Rights Act of 1991 which states "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including arbitration is encouraged."

Some courts, however, have leaned the other way since Gilmer and have ruled that lawsuits were not precluded despite arbitration provisions. See Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994) (court will only enforce such agreements which waiver of judicial forum is "knowingly" agreed to; fact that arbitration clause in question did not describe the types of cases that were subject to arbitration, court finds that plaintiffs could not have knowingly waived their rights to litigate race, sex and age discrimination claims). See also EEOC v. River

Oaks Imaging and Diagnostic, 1995 U.S. Dist. LEXIS 6140 (S.D. Tex, 1995) (arbitration agreement not enforced where it interfered with right of employees to file complaints with EEOC, where employee had to pay all arbitration costs and where the employer was free to litigate but the employee was not).

C. ARBITRATION IN THE COLLECTIVE BARGAINING CONTEXT

Many individual agreements to arbitrate discrimination claims have been upheld by the courts since Gilmer. In the context of collective bargaining agreements, however, a number of courts have ruled that pursuing a grievance to arbitration will not preclude judicial action on the same claim. These courts generally hold that Gardner-Denver should govern the reasoning rather than Gilmer. For example, in Claps v. Moliterno Stone Sales, 819 F.Supp. 141 (D.Conn, 1993), a sexual harassment case, the plaintiff had chosen not to file for arbitration under the union contract and instead filed administrative charges with the Connecticut Commission on Human Rights and the EEOC, and finally instituted judicial action in federal court. The employer moved for summary judgment arguing that the plaintiff had failed to exhaust her grievance rights under the union contract.

The court disagreed. First noting that Gilmer and Gardner-Denver are not inconsistent, the court said the Gilmer ruling simply applied to individual employees waiving their rights individually. In the union setting, the arbitration provision is negotiated by the union on behalf of the unit as a whole. There is no individual waiver present as there is with single employee cases. The Board cited EEOC v. Board of Governors of State Colleges & Universities, 957 F.2d 424, 58 FEP 292 (7th Cir, 1992) ("it is well-established that unions cannot waive employees ADEA or Title VII rights through collective bargaining").

Thus, the Court wrote: "a collective bargaining agreement cannot -- at least as a general matter -- require an employee to arbitrate individual statutory claims."

However, in a revealing footnote, the court did leave open the possibility that Gardner-Denver could be read in a more limited fashion:

> Under this view the exclusion of individual statutory claims from the collective bargaining process would take the form of a rebuttable presumption rather than an absolute requirement; that is, the courts would assume that individual statutory claims were excluded from the grievance procedure unless the collective bargaining agreement provided otherwise.

Many other courts have taken the same general approach that Gardner-Denver governs cases dealing with union-negotiated arbitration provisions. Sewell v. New York City Transit Authority, 809 F.Supp. 208, 60 FEP (ED NY 1992); Hilliard v. National Council of Senior Citizens, 1992 US Dist. LEXIS 7493. See Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 66 FEP 227 (CD ILL

1994), where the court ruled that an employee who did not sign an individual agreement to arbitrate and who is bound only by the union's collective bargaining agreement is not required to arbitrate Title VII claims where he is suing to enforce statutory rights and not contract rights, following Gardner-Denver.

In Iran v. Iran, 54 F.3d 115, 2 WH Cases 2d 1156, (1995), the Second Circuit held that an employee was not required to seek arbitration under the collective bargaining agreement before presenting the merits of his FLSA claims in federal district court, relying on Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 24 WH Cases 1284 (1981).

In Humphrey v. Council of Jewish Federations, 901 F.Supp. 703, 69 FEP 201 (1995, SDNY) a former employee's claims under Title VII and 42 U.S.C. Sec. 1981 were not precluded by prior adverse arbitration awards involving identical facts, citing the Second Circuit's decision in Iran, as well as the U.S. District Court's ruling in Clapps.

However, one very recent case may signal that this issue is not at all that clear and opens the door for arguing that union arbitration clauses can preclude judicial relief.

In Austin v. Owens-Brockway Glass Container, Inc., _F.3d_, No. 94-1213 and 94-1265, reported in Daily Labor Report, 3-15-96, p. E-1 (4th Circuit, March 12, 1996), a federal appeals court by a 2-1 vote ruled for the first time that an employee cannot sue an employer for violations of Title VII without first going through the grievance procedure and arbitration procedure of her collective bargaining agreement.

In Austin, the employee was terminated from her position with Owens-Brockway following a workers' compensation injury. She did not grieve under her union contract but instead field suit claiming violations of the ADA and Title VII. The lower court granted the employer's motion for summary judgment; the Fourth Circuit agreed.

After finding that the employee had standing to file a grievance had she chosen to, the Court began by noting that, even though the Federal Arbitration Act and its presumption in favor of arbitration, did not apply to collective bargaining agreements in the Fourth Circuit, the Court would instead analyze the case under the general principles of federal labor law, which still favors arbitration of labor disputes.

The Court then observed that the collective bargaining agreement in question had a very broad clause banning discrimination on the basis of sex and disability. Language appeared in the agreement that specifically stated that the "contract shall be administered in accordance with the applicable procedures of the ADA" and further that the company and the union would "comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap or veterans status."

The Court then reviewed the Gilmer case, citing in particullar the Gilmer Court's strong presumption in favor of arbitration.

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced the intention to preclude a waiver of judicial remedies for the statutory rights at issue. Gilmer, 500 U.S. at 26.

The Court then went on to note that Congress had been very clear that it was in favor of, not opposed to, arbitrable remedies for Title VII claims. The Civil Rights Act of 1991, amending Title VII, itself states:

> Where appropriate and the extent authorized by law, the use of alternative means of dispute resolution, including arbitration is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by the title. Pub. L. No. 102-166, Sec. 118, 105 Stat 1071, 1081.

The ADA passed around the same time, contained identicall language, the Court noted, at 42 U.S.C. Sec. 12212, thus heightening Congress' more recent intent to nudge parties toward alternative dispute resolution procedures, including arbitration. If anything the Court felt this reflected a growing sense in Congress and elsewhere that arbitration may provide an effective way off handling the growing number of discrimination claims, different from the 1960s and 1970's.

The Court spent considerable time reviewing the many decisions in which other courts have upheld arbitration agreements between individuals and employers, even where the dispute involved Title VII or other statutory claims.

> The only difference between [those] cases and this case is that this case arose in the context of a collective bargaining agreement... In all those cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes... So long as the agreement is voluntary, it is valid and we are of the opinion should be enforced.

The Court drew a parallel to the unions' right to negotiate away the rights of individuals to strike. "There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term and condition of employment and as such, the union may bargain for this right."

In dissent, Judge Hall wrote that he agreed that the "only difference" between the instant case and the Gilmer line of cases cited by the majority was the fact that the instant case arose under a union contract. He added, however, that "the majority fails to recognize that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim," citing Gardner-Denver. The dissent noted

that this decision, coupled with the Second Circuit's decision in Iran, *supra*, has now created a conflict in the circuits which may ultimately have to be resolved by the Supreme Court.

Of particular help to the employer in the Austin case was the presence of detailed anti-discrimination language in the collective bargaining agreement, enhanced by references to outside discrimination laws. This language, made it clear that the parties envisioned grievances and arbitration cases involving potentially, at least, interpretations of Title VII and the ADA. To the extent some courts have looked for specific intent to have arbitration cover such laws, the contract in Austin satisfied that concern. See, Claps, *supra*, where the court suggested that such a clear intent in the union contract may be sufficient to rebut a presumption against waiver of judicial rights.

Unaddressed in the decision, however, was the fact that the individual could not invoke arbitration on her own. In the end the contract, like so many collective bargaining agreements, indicated that the union would be the one party to invoke arbitration. The court was able to sidestep this issue to some degree because Ms. Austin did not even file a grievance, let alone ask for arbitration. Thus, the question of whether to arbitrate or not never arose. However, in another case, the question may arise about who has the right to invoke arbitration. Inevitably, the court would have to review the duty of fair representation question in some future setting if only the union could invoke arbitration. For example, would an employee be allowed to litigate in court if she filed a grievance but the union, for whatever reasons, chose not to invoke arbitration on her behalf?

These would create difficult issues since in order to uphold the supremacy of the collective bargaining agreement, the court would have to also uphold the union's right to decide whether to invoke the process. This would put the employee in the unenviable position of wanting to use the arbitration procedure but not having the right to invoke and at the same time facing an employer argument that she is precluded from going to court because her union, as her agent, chose not to arbitrate. Courts may be reluctant to impose such a burden on the employee where important individual statutory rights are at stake.

Such a situation would contrast with those cases where the employee and the union have gone to arbitration and lost and then the employee filed suit in federal court. In those cases, the court may more readily say that the issue of voluntariness and free choice has been met. The arbitration route was available and was invoked. Having been invoked, the employee cannot now go to court since that arbitration process was meant to be final.

D. THE FURURE: PROS AND CONS OF ARBITRATION

The wave of discrimination litigation has yet to crest. The number of claims and the dollars involved in such cases continue to rise, especially for colleges and universities.

The central question now facing employers is whether they would prefer to battle these cases out in court, with the full range of judicial processes and review, or consider the more cost-effective and expeditious route of arbitration but with more limited protections.

The debate about the benefits of arbitration versus court litigation is a controversial one with pros and cons on each side for employers. On the plus side, arbitration is, first of all, significantly less expensive than court litigation. There are many reasons for this, not the least of which is that discovery, the principal cause of high legal fees, is dramatically limited in arbitration.

Second, arbitration is much speedier than court litigation, creating a situation where cases can be resolved in a matter of months rather than years. This must be seen as a benefit for both plaintiff and defendant. These cases, in addition to economic cost, carry a tremendous emotional burden for all concerned that only grows heavier as time goes on. Arbitration can lessen this concern.

Third, arbitration is a private process, creating less institutional exposure to public debate over the merits of positions. In a campus setting especially, this can be an attractive quality.

Fourth, a decision by an informed arbitrator may seem less risky to an employer than a jury, who may be more swayed by the emotion of the trial and less guided by legal instructions. This may be particularly important in situations where liability is found and damages are at issue.

Fifth, the expenditure of administrative time in preparing for arbitration, while still substantial, is likely to be far less than preparing for a trial over the course of two to three years, or more. Also, the availability of witnesses is more likely not to be a problem in arbitration -- an important issue where students have to testify and may have already graduated by the time a federal or state lawsuit reaches trial.

On the other hand, there are some things lost in the process. The most telling is the loss of judicial review. While arbitration awards can be reviewed in court, and the parties can provide for this in their own collective bargaining agreements, the scope of review is usually limited. Important questions dealing with shifting burdens of proof, so essential to understand in a discrimination case, may remain free from appellate scrutiny. If the arbitrator "didn't quite get it," relief for the employer may be unavailable compared to judicial appellate review.

Second, the very factors that make arbitration attractive -- speed, inexpensiveness, informality -- may lead to an increase rather than a decrease in cases. Employees who may not have chosen to undertake a long road of court litigation may be more than happy to take a short stroll to arbitration to get their "day in court."

Third, in cases where summary judgment might be available to an employer in court, it may be less likely that an arbitrator will throw a case out on summary judgment grounds. In fact, it may be difficult to even have such motions, or some related types of motions, heard in arbitration. On a related point, arbitration is a less controlled process by its very nature. It is likely, for example, that most arbitrators will be less strict about rules of evidence than a judge will be, thus opening the door to a lot of extraneous evidence getting into play.

E. STRENGTHENING THE LIKELIHOOD OF MAKING ARBITRATION THE EXCLUSIVE FORUM

Assuming an administration wants to have Title VII, ADEA, ADA and other discrimination cases heard in arbitration instead of court, how can cases be strengthened so that courts might be more inclined to approve arbitration under collective bargaining agreements as the exclusive means of resolving discrimination claims?

It would appear based on the case law so far that the strongest cases would be those in which the language of the collective bargaining agreement is structured so that a court could find clear intent and appropriate waiver. First, the contract should have a detailed anti-discrimination clause that spells out the protected areas and refers to the appropriate state and federal statutes by name.

Second, the arbitration article itself should make it very clear that the arbitrator is empowered to hear these cases; that the arbitrator can consider the case law under the anti-discrimination statutes; that he or she can actually rule upon the question of whether the statute has been violated. In doing this, the parties can begin to address the Court's concern in Gardner-Denver that there was no intent to have the arbitrator rule on the statutory questions. While this may be counter-intuitive for management attorneys who routinely have sought to limit the scope of the arbitrator's authority to the four corners of the contract, it may be essential if an administration wants to prevail on a theory that arbitration is the exclusive forum for resolving Title VII and similar statutory claims.

On this point, one is reminded of the standards of the National Labor Relations Board in situations where it will defer to an arbitration award that involves an alleged unfair labor practice under the National Labor Relations Act. The NLRB will do so as long as the following standards are met: (1) the unfair labor practice issue must have been presented to and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) all parties agreed to be bound to the result of the arbitration; and (4) the decision of the arbitrator was not repugnant to the Act. See Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955); The Developing Labor Law, (BNA 3rd ed., 1992), p. 1049. Similarly, in discrimination cases, the parties must make sure the statutory issues are squarely presented to the arbitrator and the other standards are met.

The issue of a knowing waiver of the judicial forum by the employee is a more difficult issue. The Austin case suggests that it is permissible for the union

to have waived the judicial forum for the employee by bargaining for arbitration clauses. This particular point was of fundamental concern for the dissenting justice who felt that Gardner-Denver had answered this question the other way -- namely that while a union could waive collective statutory rights such as a right to strike, it could not waive individual statutory rights. In Gilmer and related cases, regardless of the imbalance of power and other issues, it is at least clear that the employee acting alone has agreed to be bound by the arbitration process, sometimes directly and sometimes indirectly. In the end we may have to wait for the Supreme Court to tell us whether it will revisit Gardner-Denver in light of Gilmer and allow a union to waive the judicial forum for all of the employees it represents.

However, there are still some ways to strengthen an employer's position on this point at this time. It is possible, although it may be difficult to achieve, to negotiate with a union a provision whereby each employee signs a letter indicating that he or she is agreeing to use arbitration as the exclusive route for discrimination cases. This concept is sometimes used in unionized industries where management also wants its employees bound by non-competition clauses. A union may end up negotiating a requirement that individual employees sign such a restrictive agreement. The same approach could be used in getting individual employees to sign arbitration clauses.

It is even conceivable, for those concerned about adequate consideration for the waiver, that the duty to sign an individual letter agreeing to arbitrate could be keyed to some additional benefit for the bargaining unit. Or it may be that each employee who wants the benefit agrees to give up the right to a judicial forum. This, of course, might leave some employees bound to process cases to arbitration and others free to go to court; but it does meld the individualized waiver of Gilmer with the collective bargaining process. (New employees could be made to sign such agreements as a condition of hire).

Another area to cover in advance is the question of who can invoke arbitration -- the union or the employee? While most contracts allow only the union to go to arbitration, a provision might be included in the collective bargaining agreement that would permit, in discrimination cases only, an individual to pursue a grievance to arbitration independently of the union and with his or her own counsel. This exception would avoid the inevitable situation in which a union, for reasons related to the group interest, may decide to forego arbitration of an individual's case. Again, this would address the Court's concern in Gardner-Denver that rights might be submerged by the union for collective interests. Allowing the individual employee to invoke arbitration in discrimination cases would avoid having to deal with difficult issues of the duty of fair representation and whether an individual is still precluded from filing a lawsuit if the union chooses not to arbitrate. With individual access, various options occur: the union may pursue a grievance claiming discrimination all the way to arbitration; or, if the union chose not to, the employee could do so alone with his or her own counsel; or, even if the union was willing to arbitrate, the employee would have a choice as to whether to use the union or use a private attorney. (There are many instances

in which a union will allow a member to have private counsel at arbitration as either co-counsel or in place of union representation).

Other important changes that could be made would be to write language into the contract that allows some degree of limited discovery -- perhaps a time period of 60 or 90 days -- for each party. This runs counter to the general rule that arbitration has little pre-hearing discovery, but it may make the procedure more acceptable for a court reviewing the exclusivity of the process.

Using arbitrators with particular expertise in discrimination cases might be written into the contract, so as to enhance the quality of the proceeding. Some state agencies are experimenting with arbitration as an alternative to processing discrimination claims and may be creating lists of arbitrators with special background or experience in this type of case. Tripartite panels might be added to allow more considered review. Once again, this is something the parties can write into the contract to enhance the prospect of court approval.

A more difficult issue is the area of remedies. For employers, one of the benefits of arbitration is that it is usually, though not always, confined to back pay and compensatory damages, but not punitive damages, emotional distress or attorneys' fees. The parties are free to instruct the arbitrator in their contracts as to the scope of relief that may be awarded if liability is found. Certainly, if the parties agree that the arbitrator can award damages equal to those available under relevant statutes, the employee will be more comfortable using the process and courts may be more inclined to uphold the use of arbitration as an alternative to court -- but employers may find this more problematic.

In light of the growing trend in favor of alternative dispute resolution, and arbitration in particular, one could foresee the courts gradually upholding the exclusivity of arbitration to handle discrimination claims, even under union contracts. However, the more the concerns about the process expressed by some courts are addressed the more likely it is that the process will be upheld. Some of the concepts reviewed here may help reach that result.

ARBITRATION AND GRIEVANCE PREPARATION

B. ARBITRATION IN FACULTY HIGHER EDUCATION

Nicholas Russo, Esq.
Director of Legal Services
Professional Staff Congress

The topic of "The Status of Grievance Arbitration in the Academy" to the outsider might not appear to be a particularly fascinating topic. To anyone who administers or is employed by a college or university, especially if a party to a union contract, the times that we live in make this an especially interesting topic.

And, that is interesting in the Confucian curse sense: That the object of the curse should live in interesting times.

The program description of the topic that this panel is to address states that emphasis will be given to "procedural rights" and "the limits on substantive arbitration." My shorthand definition of "procedural rights" is what a faculty member is entitled to vis-a-vis "limitations on substantive arbitration" which is what the academy succeeded in not surrendering. Where these "rights" and "limits" come from are generally found in the collective bargaining agreement.

Arbitration is the final step of the dispute resolution mechanism outside of the court system. It is intended to be quick, informal and private. It is the place you go to when the parties to the contract cannot agree on what they agreed to.

In the context of a union contract, arbitration is the end-step of dispute resolution mechanism provision of the union contract. It is the keystone provision of the collective bargaining agreement because it holds the contract together, allowing the parties to "agree-to-disagree" while, hopefully life goes on with the remaining matters covered by the contract.

ARBITRATION AS IT IS PRACTICED IN PSC/CUNY BARGAINING UNIT THE JURISDICTION OF THE ARBITRATOR

Understanding the parameters of the arbitrator's jurisdiction essentially answers the questions regarding "procedural rights" and how those rights are

restricted by "substantive limitations." The arbitrator's authority to resolve disputes under a contract can be defined and limited by the provisions of that contract. If the parties intend on limiting the arbitrator, generally they must tell the arbitrator what those constraints are. Otherwise, s/he can dispense what the courts have called "industrial justice" with great latitude, keeping within the statutory scheme that an arbitrator has not strayed beyond the matter submitted to him/her, been bribed, or engaged in misconduct. The test that the New York courts often apply when weighing whether to enforce or to set aside an arbitrator's award is not whether the court itself would have decided a dispute differently than the arbitrator but whether the award is "completely irrational."

In the PSC/CUNY bargaining unit, procedural rights are stated in the contract and, in some cases, elaborated upon in the university's bylaws. They include the evaluation procedure; access to and maintenance of files; the "Presidential Reasons" provision which is the exception to the CUNY "no reasons" policy; and the standard that decisions not be arbitrary, capricious or discriminatory.

Provided in the university bylaws and or college governance plans are a peer review committee structure and academic appeals procedure; and an itemization of the department chair's duties and responsibilities, especially in regard to the role of guidance giver and keeper of the faculty members' files.

Substantive limitations as to "academic judgment" are defined in section 20.5(b) of the collective bargaining agreement as:

> the judgment of academic authorities including faculty, as defined by the Bylaws, and the Board (1) as to the procedures, criteria and information to be used in making determination as to appointment, reappointment, promotions, and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance or action based in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his or her own judgment therefore, provided that the Arbitrator may determine (i) that the action violates a term of this agreement or (ii) that it is not in accordance with the Bylaws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the Bylaws or written policies of the Board.

Other substantive limitations on arbitral review include the "no reasons" policy of the university for negative personnel decisions (except for "Presidential Reasons"); the confidentiality of the nature and substance of the discussions of the peer review personnel and budget committees; and the "closed" personnel file,

which primarily contains letters of reference and which is available only to those recommending reappointment, tenure and promotion.

The disciplinary cases under the PSC agreement have a different panel of arbitrators and contain a specific limitation on the jurisdiction of the arbitrator: The arbitrator may not rule on a violation of any other contract section; only on "guilt," "innocence" and, where applicable, the "appropriateness of the penalty."

This stricture ties the hands of the arbitrator and provides for the possibility of a tainted arbitral judgment since the arbitrator may not take into account contractual violations as they impact upon the disciplinary action, e.g. improperly generated documents -- not shown to or initialed by the respondent -- that end up in the respondent's file and/or offered against the respondent as evidence of misconduct.

In order to understand what is happening to arbitration -- as the place of last resort for quick, informal and private resolution of the disputer -- we must access the environment in which arbitration is operating, be it at CUNY or elsewhere.

The Polish poet Antonin Slonimski -- whose work I am sure is familiar to everybody here -- wrote, "How frightening is the past that awaits us." (One wonders if he saw Michael Fox, "Back to the Future" before he came up with that).

But I want to play a little "Back to the Future" with you by looking back nine years to some of the comments I made at the 15th Annual Baruch Conference about what was happening on the outside of the academy. Nine years ago I said:

> For some time now we have lived in a throwaway society of toss-away wipes, disposable diapers, and styrofoam coffee cups. The latest addition to the garbage heap, unfortunately, is the human being, especially the unemployed and the homeless. Confining ourselves in this discussion to the unemployed -- although all too often one condition leads to the other -- it is indisputable that the firing of more than 11,000 air traffic controllers following the 1981 PATCO strike symbolized both an anti-union and anti-worker bias that was to set the tone of the 1980's. The last six or so years have also seen a large number of corporate mergers in the name of efficiency and competition, while the enforcement of antitrust laws has been conspicuously absent.
>
> The brunt of economically motivated decisions, historically and currently, seems to fall squarely on the shoulders of working people. While thousands upon thousands of corporate employees are retrenched in the name of efficiency, the corporate leadership get multi-million dollar salaries and bonuses. Never mind the deep societal implications of abolishing jobs on the families and dependents of breadwinners: on crime, on drug abuse, on the ability to educate their children."

What has happened since then? -- Between 1991 and 1995, nearly 2.5 million Americans lost their jobs because of corporate restructuring. At the same time, the top pay for corporate executives rose to nearly 200 times that of the average employee, compared to only 40 times 20 years ago.[1]

In 1995 alone, there were 8,956 mergers, worth almost $458 billion. Some of the more formidable mergers were:

• Chase Manhattan/Chemical Bank:	12,000 jobs lost
• Marion Merrell Dow/Hoechst:	8,000 expected by 1997
• Upjohn/Pharmacia:	4,000 expected over next 2 to 3 years
• Scott Paper/Kimberly-Clark:	2,700 by 1997
• First Chicago/NBD/Bancorp:	1,700 by end of 1997.

And as a result of corporate restructuring:

- ATT will eliminate upwards of 40,000 positions over the next three years - this from a company with 1994 profits of $4.7 billion.
- United Technologies has eliminated 33,000 jobs in the United States, while adding 15,000 overseas.[2]

Returning to my 1987 commentary:

> In addition to the anti-worker bias, there is another serious undercurrent in the world outside of the academy that deserves attention...evidence of Orwellian intrusion, governmental and otherwise.
>
> In 1985, self-appointed guardians of the faith, arrogating unto themselves the name of Accuracy in Academia, announced that they were dispersing student spies in college classrooms, targeting leftist professors.

In May, 1995, Accuracy in Academia distributed a letter seeking funds to publish a 10th Anniversary project: a report that would identify leftist and, an additional category, homosexual professors who have engaged in such activities as:

- "bashing Ronald Reagan," referring to, but not naming, one University of Texas/Austin professor for calling President Reagan a "son of a b----;"
- "pushing radical feminism;"
- "promoting Gay Studies;"
- "politicizing teaching throughout America's higher education system;" and
- seeking "to transform basically good-hearted conservative college kids into a new generation of leftist activists."

At the May, 1987 Baruch Conference, I reported about a then recent U.S. Supreme Court decision called Bowers v. Hardwick,[1] which upheld the right of a state to examine and criminalize the bedroom activity of consenting adults.

Here is a concrete example of how that holding can take form in 1996. On February 29th, the Utah state legislature overwhelmingly approved a bill that would have prohibited teachers from engaging in any activity in their private lives that would undermine the morals of children or the public confidence in schools or create a significant disturbance in the schools. This bill was referred to as the "Teachers as Second Class Citizens Act" by the Utah Education Association.

I learned recently that the governor of Utah vetoed the bill, but that it will be resubmitted in a different version at a special session of the legislature on April 17th. I was assured that even a revised version, though more acceptable to the Utah Education Association, is nonetheless destined for a court challenge by the ACLU.

Insert any currently unpopular status group or ideology into the framework of such a statute, and Alexis de Tocqueville's vision of the tyranny of the majority is seated squarely on the bridge of your nose. In 1987, I asked:

> Now, you say, what do corporate mergers with their resultant impact on unemployment and low employee morale and what does the atmosphere of intrusion all have to do with "Tenuring the Professor?" [which was the topic of that paper]. The connections are not so obscure.
>
> The atmosphere that has saturated corporate America -- that an employee is a throw-away commodity to be disposed of like a soiled Huggie -- is beginning to permeate and will continue to affect decisionmaking by university administrators. Let us not forget that many university trustees in the private and public sectors come from corporate America. And like the corporate axe, there will be pressure to reduce or eliminate tenured positions, undoubtedly in the name of efficiency and economy. Tenure as a concept will come under attack, while particular tenured positions will come under scrutiny.
>
> What may also accompany the move to streamline and economize -- depending, in part, on crucial developments in the economy -- is a witch-hunt by the forces of intrusion and the self-appointed guardians of the true and correct faith, who will use the economic axe as the excuse to truncate unacceptable views.

Moving to the present:

- 1993 NYC elects its first Republican Mayor since 1965.
- 1994 NYS ousts its 3-term Democratic liberal governor and ended

a two decade Democratic party hold on the New York Governor's Mansion.

- Also 1994, the so-called "Republican Revolution" begins in Congress, with the GOP capturing both houses for the first time in 40 years.

It should not have come as any surprise that the corporate style axe that had begun to be wielded in the 1980's would now strike at other areas of the economy, especially the public sector.

In any event, perhaps because the children of Republicans hardly attend City University, it should not have come as a shock that CUNY, along with SUNY, has become subject to retrenchment and reorganization.

In this environment, is it any wonder then that, since the last time I appeared before you in 1987, the focus of the most protracted and difficult arbitration cases between PSC and CUNY has changed dramatically.

In the early days of this bargaining unit, the especially dicey cases involved the denial of tenure, or sometimes just a one-year reappointment on the way toward tenure. A schism in a department in those days made the case all the more contentious, especially where the candidate-cum-grievant had the misfortune of being allied with, or perceived to be associated with the minority.

In one such case, in 1973, the arbitrator, in upholding the grievance, reinstated the grievant to a department that he characterized as a "political cesspool."[4]

In another case, four years later, the arbitrator sustained the grievance, concluding that "[t]he picture is of a deeply and bitterly divided department, locked in a strange battle, with almost everyone taking sides, not over philosophical issues, but over power, 'perqs' and privileges." Based on written evidence of the department P and B's sentiment, the arbitrator decided that the peer judgment committee "...was in no mood to exercise academic judgment in the grievant's case."[5]

Clearly by 1992, but even before, most of the players learned their lessons from th ese and many other arbitration experiences, requiring:

- that evaluations be fairly conducted;
- that files be properly maintained; and
- that presidential reasons for turndowns be grounded in the candidate's record.

The decisionmakers performed their jobs properly or those above them, in the context of the grievance steps prior to arbitration, for the most part recognized which cases to settle, thereby avoiding arbitration.

Beginning approximately in 1992, however, the next generation of most contentious cases began. These cases involved the intention of a college to seek the removal of someone holding tenure through the use of the collective bargaining agreement's disciplinary procedure.

Although the parties to the contract had revised the disciplinary procedure to include arbitration as the final step in 1984, it was not until 1992 that three disciplinary cases began which reached arbitration about a year later.

All three cases involved allegations of sexual conduct, not academic judgment. One of the three cases involved accusations that implicated only the college's premises. The second involved allegations both on and off the campus. While in the third case, there were no accusations implicating any students or staff of the premises on the college involved. You see, the holding of the 1986 Supreme Court decision Bowers v. Hardwick, permitting scrutiny of private conduct, was alive. All of these cases were factually complicated, with two having particularly thorny legal factors compoumnding them. All were emotionally charged. Two got attention from the media. One has not yet been finally resolved.

The atmosphere outside of the arbitration hearing room -- of religious right zealotry, corporate downsizing, the Republican Revolution and its impact on the size and priorities of government, clearly affects the environment in that hearing.

Arbitrators, like judges, do not operate in a vacuum. A most dramatic example of that is the recent imbroglio involving tenured-for-life U.S. District Court Judge Harold Baer, who has had his preliminary ruling on the exclusion of evidence in a criminal matter reviewed by the press and the politicians.

Unlike tenured judges, arbitrators depend on being acceptable for future business, so they usually try to keep both parties happy. But, they also know that their decisions in high profile cases may be reported in arbitration publications and even in the mainstream media. How that arbitrator will be viewed by other-than-the-parties suddenly can influence the outcome, since "future business" does not come only from the parties to the current case.

There is another trend affecting how arbitrators in higher education cases and elsewhere respond to the parties and, yes, even decide their cases. Union membership has shrunk from a third of the workforce in the 1950's to approximately a sixth today.

The number of labor arbitration cases decided under the auspices of the American Arbitration Association between 1986 and 1993 has fallen by about 17 percent. There is an awareness among arbitrators that the power and influence of unions has diminished, thereby reducing in the arbitrators' minds the future-business impetus to reaching a judgment deemed fair by both sides.

At the same time, there is a trend toward arbitration of employment disputes in non-union corporate settings. Some companies without unionized employees are

setting up ADR procedures as a way to reduce costly litigation. Some of these non-union arbitration procedures are mandatory: The employee is informed that by accepting or continuing in employment s/he accepts and agrees to the imposed system.

Since the companies write the procedures without any involvement of unions or employees, it is not surprising that they are weighted in favor of the company: no steps prior to the arbitration; limitations imposed on discovery before arbitration; and the company paying all of the arbitrator's fee, to identify some of those factors.

At first blush the employee may think this is a good deal. But, what message does that send to the arbitrator about future business with that company? And what equality exists at an arbitration table where the arbitrator repeatedly deals with the same company lawyer(s) whose client pays the bill vis-a-vis a constantly changing face representing the employee? And what discharged employee has sufficient finances to retain counsel to fight a case with a less than likely successful outcome?

For arbitration as a process to continue successfully, there should be a return to a more informal process and greater latitude given to the parties presenting their cases. Arbitrators should not allow, as happened in a recent case in which I was involved, the entry of Federal Rules of Evidence.

There must also be an even playing field. A strong faculty union plays a particularly important role in this respect. It contributes toward what the framework will be for the due process employment decision. This makes the eventual decision, whatever its outcome, more acceptable. And the union offers resources -- by providing a knowledgeable advocate for his/her position and the funds necessary to process that claim -- to enable the employee-side of the question to achieve some industrial justice.

Particularly in a higher education context, a strong union serves an additional purpose that should be valued even by a university administration -- that of a countervailing force to extremist elements that seek to silence or ostracize faculty members who hold different views or who explore solutions to problems in an unorthodox way. What is academic freedom about if it does not include the right to think differently? If for political or financial reasons university management cannot withstand the outside pressure, it can always "blame" the union, which usually has broader shoulders on matters of this type.

But ultimately it is the arbitrator who plays the crucial role in keeping the playing field even and remaining a true alternative dispute forum and not just another courtroom. S/he accomplishes this by not allowing the advocates of the parties to bog down a case in overly legalistic arguing and by not permitting the entry of extraneous, irrelevant, inflammatory influences.

Arbitration as the end-step of a dispute resolution provision of a collective bargaining agreement must be the place for a quick, informed judicious resolution of a conflict. Arbitration's continued viability as part of the overall American system of dispute resolution is crucial to maintaining a society where we fight our wars in hearing and court rooms, not in the streets of our neighborhoods.

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ARBITRATION AND GRIEVANCE PREPARATION

C. GREIVANCE PREPARATION FROM THE UNION PERSPECTIVE

C.J. Elder, Assistant Director, Contract Implementation
Association of Pennsylvania
College and University Faculty

I. INTRODUCTION

The enforcement of a collective bargaining agreement (hereinafter referred to as a labor agreement) involves a great deal of time, effort and resources. The foot soldiers in the enforcement of most labor agreements are the grievance representatives at the local and state/regional levels. Grievance representatives perform many functions. We educate our membership regarding their rights under the labor agreement; we assist them in writing and processing their grievances through the grievance procedure; we perform merit assessment of grievances; we investigate facts and evidence material to grievances, and prepare grievances for arbitration, including researching prior cases, analyzing controlling labor relations principles, and choosing witnesses. In addition to these duties, a successful grievance representative exhibits empathy and understanding for the people who believe they have experienced injustice at the hands of management. The focus of this paper will be the technical aspects of the grievance representative's job as described above. Although this paper will attempt to provide a broad and general overview of grievance processing, a public sector, higher education union perspective will be evident throughout.

II. ENFORCEMENT OF THE COLLECTIVE BARGAINING AGREEMENT THROUGH THE GRIEVANCE PROCEDURE AND ARBITRATION

A. A Historical Overview of the Grievance Procedure and Arbitration

The original role of the grievance procedure and arbitration was to provide an alternative to strikes at a time when it was necessary to the national security that the demand for a steady flow of manufactured goods and armaments be met in America -- World War II. During the war, President Franklin D. Roosevelt, in order to ensure a continuous and regular supply of arms and materials, forbade industrial strikes and created the War Labor Board which created and required employers to implement the grievance procedure and arbitration as a substitute for

strikes in resolving labor disputes.[1] Following the war, unions flourished, and in 1960 arbitration was established as the preferred method of resolving labor disputes through the Supreme Court decisions commonly known as the "Steelworkers Trilogy."[2] This trio of decisions established that the *quid pro quo* for the union's promise not to strike during the term of a collective bargaining agreement is management's agreement to engage in binding arbitration of labor disputes. The result of these decisions has been the widespread use and acceptance of the grievance procedure and arbitration.

The grievance procedure and arbitration are an extension of the negotiation process.[3] Once a labor agreement is negotiated and signed by the parties, management assumes the duty of administering the provisions of the labor agreement. The union's duty is to enforce it. When management neglects to properly administer the labor agreement's provisions, the union's enforcement instrument, the grievance procedure, is initiated. As an extension of the negotiations process, the grievance procedure serves several purposes. First, it is the primary means of enforcing the promises made in the labor agreement. Second, it serves as a means to locate ambiguities in the negotiated language. Third, the grievance procedure serves to locate areas of the labor agreement which the parties may want to re-negotiate at the end of the current contractual term.[4]

Although many labor agreements contain their own definitions of what constitutes a grievance, there is no universally accepted definition of a grievance. A grievance can be oral or written, informal or formal, it can allege a violation of the labor agreement, or simply allege an inequity or injustice as seen by the grievant which is not addressed by the labor agreement at all. Given the abstract nature of grievances, and individual new to collective bargaining might assume that the grievance procedure itself is a very unstructured process. Of course, this is not true. Through the years, labor and management have handled and processed grievances in a very effective manner through a standardized process known loosely as the grievance procedure. Since its inception, the grievance procedure, and its process of interpretation and administration of the labor agreement, has been refined and standardized. Originally, there was little distinction between the negotiation of a labor agreement and its interpretation. As mentioned above, the establishment of a multi-step grievance and arbitration procedure in labor agreements was rare until World War II and the creation of the War Labor Board. The Board recommended that all labor agreements include separate provisions for multi-step grievance procedures, culminating in third-party arbitration.[5] This recommendation received widespread support from labor and management, and today, roughly 99 percent of all labor-management contracts contain grievance procedures.[6]

Over the years, the grievance procedure has been polished into a four-step or sometimes a five-step process. At any step in the grievance procedure, resolution of the grievance through settlement is possible. In fact, an overview of the grievance procedure reveals that it provides opportunities for settlement at successively higher levels of union and management as the grievance is processed

to the next higher step. This process of settlement opportunities requires the union and management to interact with each other, often in person, regarding grievances, and is designed to promote settlement of labor disputes whenever possible.

B. A Brief Review of the Grievance Procedure -- Informal Grievances, Formal Grievances, and Arbitration

A chart which demonstrates the parties involved at each step of the grievance procedure is provided at the end of this section. The first step of the grievance procedure often takes place as an informal meeting between the employee and the lowest level of management that can work with the employee to resolve her grievance. Usually, the lowest level of management is personified by the floor supervisor, or the dean in the case of higher education. A Step One grievance normally consists of an oral statement of the problem(s) giving rise to the grievance. This usually elicits an oral response to the grievance by management. Although most unions would prefer that a grievance representative be present when the grievant and management interact at this level, it is not uncommon for grievants, at the first step, to approach management without representation. As we will see later, this is the time when the grievant can cause the most damage to his/her case, as (s)he interacts with management and presents information that (s)he believes might help to resolve the issue. The grievance can be resolved at this level by mutual agreement of the parties, and if a settlement does not occur or management has not responded to the grievance to the grievant's satisfaction, the grievant can forward his/her grievance to the second step of the grievance procedure.

Step Two of the grievance procedure is considered to be the first formal step in the grievance procedure, and is often the first time that the grievance is put in writing and reviewed by a grievance representative. "The primary function of the formal steps [of the grievance procedure] is to narrow the scope of the dispute to the specific issue of disagreement between the union and the employer."[7] Thus, the local grievance representative's primary role at this step is to assist the grievant in writing a grievance which clearly articulates the issue(s) in dispute, limiting the statement of the grievance to the specific management act(s) which the grievant believes violated the labor agreement. Local grievance representatives are often known by titles such as union steward, grievance chairperson, or grievance committee member. In addition to assisting the grievant in writing the grievance, the grievance representative gives advice about time deadlines to file the grievance with management, what articles of the labor agreement to cite, and how to properly frame the allegations and remedy. The local grievance representative can approach management regarding settlement of the grievance at this step, or management can propose settlement.

If the grievance is not resolved through the efforts of the local grievance representative at the second step, or if management's second step response to the grievance is not satisfactory to the grievant, (s)he can request that her grievance be processed to the third step of the grievance procedure. At this step, higher level union and management representatives (usually at the state or regional level, who

often have the authority to make recommendations and/or decisions regarding policy, become involved in the grievance. They receive all of the information generated at the first two steps, and conduct an additional, and often a more in-depth investigation of the allegations made in the grievance statement. The higher level grievance representative (hereinafter referred to as the state/regional grievance representative) must assess the grievance's merits at this step of the grievance procedure in order to assist the union in deciding whether the grievance should go to arbitration. Such merit assessment involves applying a higher level of scrutiny to the grievant's allegations and management's actions, further narrowing the issue(s) in dispute in order to "achieve a clear view of the possibilities for and costs involved in settlement and, ultimately, of the risks in allowing the issue to be decided in arbitration."[5]

If the grievance is not resolved at the third step of the grievance procedure, and the union believes the grievance to be valid and meritorious, the union will take the grievance to the fourth step of the grievance procedure: arbitration. Once the union has decided to take a grievance to arbitration, a process of choosing an arbitrator and dates which will be acceptable to all of the parties is initiated. Before the union decides whether it will take a grievance to arbitration, the state/regional grievance representative should have already narrowed the issue(s) of the grievance and developed a theory of the case to be presented for consideration by the arbitrator. Additionally, the grievance representative should have performed as much research and fact-finding as possible to support the allegations in the grievance. As I have often been reminded by my colleagues, arbitration is, at best, a roll of the dice. Even when the state/regional grievance representative believes (s)he has a winnable grievance, there is no guarantee that the arbitrator will agree. Surprises can happen; the arbitrator can interpret the language at issue differently; or, management may make an argument which the union did not anticipate. In short, at arbitration, anything can happen. This fact makes investigating all allegations and evidence material to the grievance doubly important in preparing for arbitration.

GRIEVANCE PROCEDURE STEP	PARTIES INVOLVED
Step One	Employee, Manager, Local Grievance Rep
Step Two	Employee, Manager, Local Grievance Rep
Step Three	Employee, State/Regional Grievance Rep, State/Regional Employer Rep
Step Four	Employee, State/Regional Grievance Rep, State/Regional Employer Rep, Witnesses,* Attorneys for Union and Employer (if applicable), Arbitrator

*Witnesses can include the local grievance rep and the local manager(s) involved at Steps One and Two.

C. How and Why Grievants Sabatage Their Cases

When it comes to writing grievances and participating in the grievance procedure, grievants can be their own worst enemy. Most employees file grievances in search of a remedy to an injustice they believe they have experienced at the hands of management. However, they often learn that once they have initiated the grievance procedure, management does not see them as individuals who have been harmed and in search of justice; instead, management often perceives grievants as possible liabilities and/or precedent makers. Thus, in many workplaces, the grievance procedure is the grievant's introduction to the adversarial relationship between the union and management. This is a natural state for these parties of which many grievants are unaware. Therefore, when an employee approaches his/her local grievance representative about filing a grievance, the representative should try to ensure that the grievant is aware of this adversarial relationship and be informed, in general, about what to expect during the grievance procedure.

To consider the grievance procedure from the grievant's point of view, it is important to note that grievants are sometimes placed in very difficult positions simply because they have exercised their rights under the labor agreement. Grievants sometimes worry that, by filing a grievance, they might be placing their relationship with management, or even their job, in jeopardy. Sometimes this is true, and sometimes it is not; but to these grievants, whether it is true or not, it is a very real concern. It is common for grievants to initially attempt to resolve the problem outside of the grievance procedure and to file a grievance only if the problem continues. Thus, for many employees, the grievance procedure represents their final hope of resolving their problem.

It is not uncommon for grievants to be concerned that by filing a grievance their popularity with members of their department and/or with the employer will diminish and their ability to work will be affected. Unfortunately, sometimes this is true. Grievants sometimes worry that they will be disciplined or fired in retaliation for filing a grievance. Sometimes this happens as well. When a grievant believes that (s)he may experience or has experienced retaliation for filing a grievance against the employer, it is the grievance representative's duty to investigate that possibility. If retaliation appears to have taken place, the union should consider filing a grievance and/or an unfair labor practice charge. In all cases, the grievance representative should take the grievant's concerns seriously, investigate them, and maintain an understanding and empathic approach to the grievant and his/her situation.

Sometimes grievants see the grievance procedure as an opportunity to air untimely allegations and arguments which have little or no relevance to the issues presented in the grievance. In these cases, the grievance representative should try to focus the grievant and his/her grievance on the violation(s) currently at issue. It is also common for grievants to provide management with large amounts of information and paperwork which they believe will convince management that its actions violated the labor agreement. However, this rarely works to the grievant's

advantage, as management will be able to use whatever information is provided in the grievance and supporting documentation to defend its actions during settlement discussions and/or at arbitration.

Grievants also tend to want to include arguments and facts which the union may not be able to support later or which may otherwise limit the union's ability to make its best arguments, distinctly diminishing the grievance's chances for success at arbitration. As mentioned above, these circumstances are most likely to occur at the first or sometimes the second step of the grievance procedure, when the grievant interacts with management on his/her own. If the grievant has initially approached management with no union assistance and requests the grievance representative's assistance afterward, the representative may be required to take part in damage control to strengthen the grievance's chances for success. In these cases, the grievance representative should debrief the grievant to determine all statements (s)he made to management and request a copy of all written documentation that the grievant provided to management. To avoid being placed in a position where damage control is necessary, it is important to catch the grievant early in the process so that the union can exercise some control over the flow of information to management. This can be accomplished, at least in part, by educating the union membership regarding their rights under the labor agreement, providing the names and locations of their local grievance representative(s) and/or local grievance committee members, and ensuring that the local union office maintains and advertises an open door policy.

Although it does not happen often, another way that grievants can hurt their chances for success is by lying to their grievance representative or at the arbitration hearing. In law school, one of the first rules I learned is that clients lie. Although I have found this type of behavior to be extremely rare, it can be true of grievants as well. Maintaining credibility is extremely important when the parties are before an arbitrator. This is an additional reason that the local and state/regional grievance representative must initiate a comprehensive investigation of all allegations and statements made by both the grievant and management before the union finally decides how it will proceed with the grievance. The grievance representative should perform his/her investigation with the underlying maxim of "trust, but verify."

D. Writing Grievances

Because most grievants tend to go into great detail in their grievances, local grievance representatives should remind prospective grievants that the grievance procedure is an adversarial process, and that they should observe specific limitations on the amount of information they provide to management in their grievance. For example, the grievance representative should provide the grievant with a specific outline to assist him/her in writing his/her grievance and advise the grievant to follow the well-known acronym: K.I.S.S. -- Keep It Simple Stupid (or to put it more politely, Keep it Short and Succinct).

Grievances should be written to include three categories: the article(s) of the labor agreement which have been violated, a short statement of the action taken by management which violated the labor agreement, and the remedy the grievant expects to stop the violation and/or to make him/her whole again. This excludes all arguments, self-serving statements, and other possibly damaging information which may return in the future to haunt the state/regional grievance representative when (s)he attempts to develop a winnable theory of the case to argue at arbitration. The additional relevant supportive materials and arguments which are not appropriate subjects for management's review may then be forwarded only to the union for its consideration and possible use during settlement discussions and/or arbitration.

III. INVESTIGATING GRIEVANCES AND PREPARING FOR ARBITRATION

A. Investigation at the Local Level

Local grievance representatives are a combination of Emmit Smith and Sherlock Holmes. They play both defense and offense when dealing with management locally, often acting as an advocate for the grievant before management, and possibly defending an employee's actions when accused of wrongdoing by management. Additionally, local grievance representatives can often be pivotal players in the process of uncovering facts and evidence for later use at the state/regional level. Training local grievance committee members and grievance representatives in the proper procedures for grievance writing and processing can be very useful when the state/regional representative finds himself/herself preparing the grievance for arbitration.

Local grievance representatives are normally the first to interview the grievant and interact with management regarding the issue(s) being grieved. Additionally, they are often the only union official to conduct face-to-face interviews with the grievant until shortly before the arbitration hearing. Given their close proximity to the grievant and the local administration, local grievance representatives can perform important functions such as assisting the state/regional grievance representative in locating supporting documentation which was generated locally and assessing the credibility of the grievant, witnesses and members of local management. Local grievance representatives may also experience a great deal of pressure from these parties, as a result of their close proximity to the grievant and local management, which may affect their objectivity and effectiveness. Overcoming these pressures can be a major challenge for local representatives. To deal with these pressures, many local grievance representatives employ well-tested methods of interacting with grievants and other interested parties such as assigning a specific amount of time to meet with grievants (say one-half hour per grievant), setting aside a certain time of day to deal only with grievances, attempting to keep the conversation with the grievant within the scope of the grievance, and working with grievants to improve their understanding of the labor agreement's language.

In addition to dealing with the merits of grievances, a local grievance representative also often assists grievants in assuring the timeliness of their grievances. Most labor agreements require employees to file their grievances within a specified number of days from the date of the management act giving rise to the grievance. If the grievance is filed beyond the time period specified, the arbitrator will rule the grievance as not arbitrable due to an untimely filing, and never address the merits of the grievance. As a result, a valid and otherwise winnable grievance will be lost on the issue of arbitrability. Thus, it is important that local grievance representatives be trained to understand the complexities of their particular labor agreement's filing deadlines so that they can effectively monitor grievances to assist grievants in ensuring the timeliness of their grievances.

In most shops, the local grievance representative is also an employee and, therefore, is required to perform the duties assigned to him/her by management in addition to his/her duties as grievance representative. Given these constraints, there are limitations as to the amount of time that the local grievance representative can devote to the grievance process. Once the grievance is processed to the third step, the state/regional grievance representative assumes the majority of the local grievance representative's administrative burdens and performs an in-depth investigation of the grievance and its merits in preparation for possible arbitration of the grievance.

B. Investigation at State/Regional Level

The majority of the grievance investigation is usually performed by the state/regional grievance representative. This is often the first time that a truly objective look at the grievance is taken, as state/regional grievance representatives are usually physically and emotionally far-removed from the local administration and the grievant, and therefore, rarely experience the same pressures endured by local grievance representatives. When the state/regional grievance representative receives the grievance, his/her primary focus should be on questions including, was the labor agreement violated; if so, can we prove the allegations made in the grievance; if we can prove the allegations, what will the remedy be; what evidence exists which management might use to discredit the allegations made in the grievance; what are the possible management arguments which we must counter; and can we counter management's arguments successfully?

Because information gathering and investigation are so important to the successful outcome of a grievance, grievance representatives at the state/regional level often become the "gumshoes" of the collective bargaining community. The investigation of grievances commonly includes three elements: verifying the grievant's allegations through testimony of the grievant, witnesses and other interested or affected parties, verifying management's statements through its testimony, such as management's written and/or oral responses to the grievance, and collecting all relevant evidence which will either support or discredit the grievance. It is important to search for facts and evidence which may be detrimental to the success of the grievance in order to perform a complete and

accurate assessment of the grievance's merits. Additionally, if the grievance does go to arbitration, it is essential for the union to know the strengths and weaknesses of the opposing party's case in order to anticipate management's arguments at the hearing and to know what witnesses and evidence to bring to the hearing in order to counter management's arguments. The state/regional grievance representative should treat and investigate all grievances as though they will be arbitrated. This approach will ensure that the union has obtained the maximum amount of information necessary to make an informed decision about whether or not to arbitrate the grievance. Means of verifying the grievant's allegations with witnesses such as fellow employees and members of management, and obtaining all relevant supporting and detrimental documentation, if it exists, from the grievant and/or management is also necessary.

In the course of an investigation, the grievance representative may hit a large and apparently immovable object, otherwise known as management. Most grievance procedures require management to respond to grievances submitted to them, but these responses are not always forthcoming with a great deal of information which will help the union decide how to proceed with the grievance. Often, in the course of an investigation, management is the only source of certain information, such as why it took a particular course of action. Management is required to provide all relevant and necessary information to the union upon a good faith demand from the union.[9] When management refuses to provide the union with the information it needs and has requested, the union may be forced to file a grievance or even an unfair labor practice charge to force management to provide that information.

A grievance's success at arbitration often depends upon supporting evidence such as records including meet and discuss minutes, payroll records, written negotiations histories, and the memories of the negotiators of past labor agreements. Additionally, the grievance representative must also perform research regarding matters which include determining if the union has filed grievances on a similar issue or the same issue in the past and how it decided to proceed with and argue those grievances. The grievance representative must also examine and analyze prior arbitration decisions which might impact the outcome of the grievance. Although prior arbitration awards are said not to have precedential value, they do have great persuasive value to most arbitrators. Therefore, if the union grieved the same issue several years ago and won at arbitration, the prior arbitration award should be provided for the arbitrator's consideration. Additionally, the grievance representative must research the facts of the case to determine if certain labor relations principles[10] that govern the issue(s) raised in the grievance could impact the success of the union's case. Such labor relations principles include, but are not limited to, the axiom that a party to a labor agreement cannot seek in arbitration what it has lost at the negotiations table, and the concept of just cause and its meaning. There are several standard publications which can provide guidance on these and other principles, such as How Arbitration Works, by Elkouri and Elkouri,[11] Grievance Arbitration: Techniques and Strategies, by Spitz,[12] and Practice and Procedure in Labor Arbitration, by Fairweather.[13]

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State/regional union and management representatives share similar circumstances with other American workers in that they both tend to have very full plates at work; and even though they should complete their investigation before the arbitration hearing, it is not uncommon for the investigation to be completed shortly before the hearing. In fact, it has been my experience that nothing focuses the mind so much on a grievance as a fast-approaching hearing date. Critical facts which may impact the success of one side are often revealed for the first time late in the parties' preparation for the arbitration hearing. When this happens, it is not uncommon for settlement to be proposed one or two days before, or even the day of the hearing. Additionally, the revelation of key facts during the hearing may induce a settlement offer during the hearing itself. Because of the importance of learning all of the facts and reviewing all of the evidence before the hearing, and preferably, before the union decides whether or not to take a particular grievance to arbitration, investigation and comprehensive merit assessment are the most important duties of a grievance representative. Additionally, the earlier in the grievance procedure the investigation is initiated, the more likely that the union will succeed in choosing meritorious and winnable grievances to take to arbitration, achieving an acceptable settlement of a grievance and/or winning at arbitration.

IV. INVESTIGATING SPECIFIC TYPES OF GRIEVANCES

A. Disciplinary Grievances

Grievances generally fall into two categories: disciplinary or contract interpretation. A disciplinary action against an employee can range from an oral warning or letter of reprimand to the employee's discharge. The issue of most disciplinary grievances focuses on whether the grievant was disciplined for just cause. Inherent in the standard of just cause is the principle of industrial jurisprudence which holds "that
discipline must be corrective to the employee and not merely punitive."[14] This principle, known as progressive discipline, requires management to give employees opportunities to correct their behavior, imposing penalties of increasing severity if the employee's improper behavior continues.[15] Under this approach, management's choice of discipline tolerates as much scrutiny as the employee's behavior. Most labor agreements contain language requiring that discipline be applied to employees only for just cause. Thus, when faced with a disciplinary grievance, the grievance representative should get the grievant's version of the facts, investigate her prior employment record and behavior on the job, interview all witnesses to the action giving rise to the discipline, and research the interpretation of the just cause standard. The concept of just cause is complex, and progressive discipline is only one of its elements. A great deal of literature is available to the practitioner which analyzes the concept of just cause in collective bargaining. One such publication is Just Cause: The Seven Tests, by Koven and Smith.[16]

B. Contract Interpretation Grievances

Grievances involving the interpretation of language in the labor agreement, if taken to arbitration, can have far-reaching and precedential results. In these cases, the arbitrator is asked to determine the intent of the parties when the contract language at issue was written. If the meaning of the language is clear and unambiguous, the arbitrator is required to apply that meaning to the issue(s) being grieved. If the meaning of the language is ambiguous, the arbitrator must determine if there was a meeting of the minds regarding the provision(s) in question. Ambiguous language can be the result of an attempt by the parties during the negotiation of the labor agreement to avoid impasse on a particular issue by drafting contract language which is designed to give each party some latitude to make an argument regarding that issue at a later time. In this way, the parties avoid impasse by "passing the buck" to the arbitrator, who will need to interpret the vague language when and if the issue arises.[17] Alternatively, circumstances can exist where the parties have agreed to ambiguous language unaware that another interpretation of the language may exist.

Once a grievance is filed over such language, it is the grievance representative's duty to construct the argument which best serves the union's interpretation of the language at issue. To make his/her best argument(s) regarding the union's interpretation, the grievance representative will examine the union's negotiations notes and the negotiations proposals of the parties. (S)he will also conduct interviews with the members of the union team that negotiated the contract in question. If the union decides to go to arbitration over this language, some or all of these individuals may be required to testify at the arbitration hearing regarding their recollections. In certain cases, the parties may have established a past practice which would itself determine the meaning of ambiguous contract language and bind the parties to follow it.

C. Past Practice Grievances

Past practice grievances often arise when a labor agreement is silent on an issue which is in contention or when the labor agreement contains ambiguous language. When the language is ambiguous and the union can show that the parties have implemented the language through a long-standing practice, the union can argue that the parties intended the term to have a meaning consistent with that long-standing practice.[18] The party who intends to prove the existence of a binding past practice must show the arbitrator proof that the practice currently in existence is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.[19] This requires establishing that both parties were aware of the practice and knowingly continued it. Therefore, it is unlikely that an arbitrator will find a past practice where management instituted a particular policy if the union was previously unaware of its implementation. "Undetected abuses of a privilege do not establish a binding practice."[20] Outside of the ambiguous language of the labor agreement, there is often very little written documentation of

past practices. Thus, the state/regional grievance representative must interview employees, examine their testimony and review the supporting documentation, if it exists, to determine if a past practice argument is appropriate under the given circumstances.

V. EDUCATING WORKERS REGARDING THEIR RIGHTS UNDER THE LABOR AGREEMENT

Enforcement of a labor agreement begins at the grassroots level. Union representatives at the state/regional level cannot keep an eye on every management act that impacts employees' working lives; however, the workers usually can. Therefore, workers must be educated regarding their rights under their labor agreement and be trained to be vigilant about its enforcement. This means that the union membership in general and, more specifically, employees who sit in positions of authority in the union, such as members of meet and discuss teams and grievance committees, must understand the basic requirements and rights contained in their labor agreement and the policies agreed to with management, and know how to recognize a violation of those documents.

It is also important to emphasize to those with authority in the union that the distinction between union and management must remain intact. It is not uncommon for situations to arise where employees and/or local union leadership who have attempted to engage in cooperative efforts with management unintentionally participate in a violation of the labor agreement. Although there are circumstances in which labor-management cooperation is desirable, there is an inherent risk in such efforts that the distinction between a union act and a management act will be blurred, making it difficult to prove that management was the sole culpable party when the labor agreement is violated. When management is able to show that employee(s) and/or the union participated or acquiesced in a violation of the labor agreement, the union's chance for success at arbitration is greatly diminished. Given these facts, the union should proceed with great caution when embarking on any cooperative effort with management that might result in a conflict with or violation of the labor agreement.

VI. CONCLUSION

Enforcement of the labor agreement involves not only the union representatives, but the entire union membership. Grievance representatives at both the local and state/regional level must ensure that workers are educated regarding their collective bargaining rights and protect those rights when management violates them. Additionally, the union must use all available means to assure that the grievances which go to arbitration are meritorious and winnable. In most cases, taking unwinnable grievances to arbitration, for whatever reason, will only hurt the union in the end, needlessly diminishing its credibility and resources.

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ARBITRATION AND GRIEVANCE PREPARATION

D. GRIEVANCE PREPARATION: A MANAGEMENT PERSPECTIVE

Esther Liebert, Dean
Faculty and Staff Relations
Baruch College, CUNY

First, let me set the framework for my discussion this afternoon. My experience has been in a multi-step grievance procedure with the first step before a college management representative, known as the labor designee, the second step before a hearing officer at the university level and the third step at arbitration. In arbitration the college is represented by the University Office of Legal Affairs and a staff attorney works closely with both the college labor designee and the step two university hearing officer in preparing and presenting the case.

There is substantial diversity in how grievances at The City University of New York (CUNY) are handled at the first step. There are some twenty units of the university, each with its own chief executive officer, and each with its own labor designee. There are probably as many management styles as there are units. To this, add the various styles of the union representatives at each campus.

FUNCTIONS OF GRIEVANCES

Grievances clarify contract language. They provide a day in court for the grievant. They may foster improved labor relations and open channels of communication between labor and management. The last would be particularly true in a grievance provision with a very broad definition of what is subject to the grievance procedure. For example, if the definition of a grievance is "an assertion of unfair treatment," the management hearing officer will be very busy. Another definition, which would narrow grievable issues, would be " an assertion that there has been a violation of the collective bargaining agreement." Something in-between might be "an assertion that there has been a violation of the collective bargaining agreement or past procedures and practices of the institution." The hearing officer will have an opportunity to deal with a much wider range of issues in either the first or last formulation.

PREPARATION FOR THE GRIEVANCE HEARING

First, study the form on which the grievance is filed. How specific is it required to be? What happens if the union representative states " the entire collective bargaining agreement" has been violated? The broader the statement the harder it is to know what to expect. Your contract should require specificity in the grievance filings.

Next, determine how high the stakes are in the grievance. This will tell you what kind of presentation the union is likely to make and will also give you some idea of how much flexibility you will have in dealing with the issue. Among the most highly charged issues is denial of tenure. Any tenure denial is likely to present special concerns and is also less likely to be capable of settlement. If the faculty member is also a member of a minority group, and is very popular with students, the stakes go up. As management's representative, you may find that you approach the hearing room to find students lined up outside waiting to express their views of the administration, an administration that would deny tenure to their professor, the first female minority member to become eligible for tenure in the last ten years. Other high stakes cases include retrenchment and unfavorable personnel actions for a faculty member who is an outspoken advocate of faculty rights.

Some examples of cases where the stakes are lower include issues involving contract application and interpretation which, while important and significant to the individual, have less of an impact upon that individual. For example:

- out-of-title work claim;
- alleged change in past practice concerning management imposition of an annual leave cap;
- contract interpretation regarding offsets to back pay upon reinstatement of a grievant.

When the stakes are lower, the union presentation will probably be more matter-of-fact.

After deciding whether you have a hot potato on your hands, learn everything you can about the case. If the grievance filing is specific, it will tell you about the nature of the grievance, the violations alleged, and the suggested remedy. If a personnel action is grieved, find out all you can about the faculty member's employment history. Were there previous grievances, discrimination complaints, sexual harassment issues, negative personnel actions reversed on appeal? Look in the personnel files; investigation pays off. A grievance representative may argue that the grievant never knew what standards to meet, but if the grievant appealed, you may find a statement prepared by the grievant demonstrating how all those "unknown" standards of the institution have been met. Review the files for contractual compliance, not only for the issues which may be claimed as violated, but generally. Talk to the department chair, dean and provost.

Find out if there is any inclination to consider a settlement, especially if in your investigation you find procedural violations which indicate that the candidate may have been harmed.

Determine whether the case presents an issue never tested in arbitration and if so, whether this case has the potential to be a solid one for testing a new issue. You will want to listen with great care to what the union says at Step 1 if you believe that the issue will find its way to arbitration. Or, determine whether the case presents issues well settled in arbitration. That may point in the direction of settlement. If an issue of contract interpretation is involved, and if you are a part of a larger system, touch base with your central office.

AT THE HEARING

Who do you bring with you? In CUNY, although department chairs are elected and often sympathetic to the grievant, they usually appear on the management side of the table and are relatively neutral. It is my practice to have the chairs present although I do exercise certain controls requesting that they wait for an indication from me before responding to a question. If I do not know what they are going to say, I may take a brief break and step outside first to discuss the matter. The chair's presence can help to resolve factual issues and to save investigative time later. If, however, you expect fireworks if the chair is there, or if you foresee a chair whose presence may make things difficult because he or she says things that you would rather not have said, do not invite the chair. You always have the opportunity to review the issues raised after the hearing. You may find, however, that the chair you prefer not to have present is called by the union as a witness.

There is one great value in having chairs present at grievance hearings. It is a wonderful training ground. There is no substitute for a stern lecture in the responsibilities of a chair from a faculty colleague, who is also the union representative, to make a chair sit up and take notice. I have repeatedly seen chairs take a more positive attitude towards contractual responsibilities after they have gone through grievance hearings, particularly arbitration.

UNION BEHAVIOR

The union representative must show his or her client that the union, embodied in the grievance representative, is doing its all on the grievant's behalf. It is, after all, the union's legal responsibility to do so. Earlier I discussed high stakes cases and how the union representative's behavior will be influenced by them. When management non-reappoints, the union's defense is likely to be very colorful. It is this kind of circumstance which is most often leads to attacks on management, posturing, perhaps even insults. The department chair may also be the target of such behavior. What is the best way to deal with this kind of situation? I have tried different things: responding, letting it run its course and

saying very little, taking a break and talking to the union representative, and minimizing the number of people present who are vulnerable to this behavior. Once I adjourned the hearing when things were so out of hand that no meaningful discussion was taking place. In general, I opt for responding as little as possible to emotionally charged commentary and behavior. I also tend not to ask many questions in such situations. What you have to listen for are the important points that are being made by the union representative in between what may be passionate embellishments on behalf of the grievant or harsh criticisms of management. As long as the hearing is moving along in the direction of dealing with the issues and as long as there are no personal attacks which seem too difficult to bear, I would continue and I would listen.

The less highly charged cases are more likely to be dealt with in a business-like fashion by both sides. These grievances often involve technical details and surely, language capable of different interpretations, and it is essential to have a clear understanding of the union's position. A free exchange of questions and information between labor and management is desirable for a full exploration of the issues.

THE FIRST STEP DECISION

If you have heard nothing significantly different from what the original investigation revealed, you may be ready to prepare a decision immediately after the hearing. Otherwise, inconsistencies and new or unresolved issues must be investigated.

At the first step of the grievance procedure you will probably hear that the contract has been violated in a host of ways and that the college continues to violate long-held and sacred policies. In this litany of charges, however, will be the two or three crucial issues that might be raised at arbitration and on which the final decision will turn. These are the ones that you must identify and listen for with great care at the first step and these are the ones on which you must focus your attention in the decision. I favor a full response to the union arguments which addresses each issue that has been raised. When you are closest to the case and your memory is fresh, you will present the best arguments. A complete decision at the lowest step will form the basis of preparation for any intermediate steps and, finally, for arbitration, which may be years away.

HEARING OFFICER'S LARGER ROLE

Management's hearing officer may listen to the union position, respond to the issues raised, and in all but the most egregious cases, deny the grievance. Or, management's hearing officer may be a person who plays a more active role. It would be unrealistic to think that there are no limits to what a management representative may do. But, convincing information presented in the best possible light may well persuade the President that keeping an open mind is a wise course of action.

Let me give you two examples. A faculty member tracking towards tenure has a record of scholarship which is inadequate in the view of the committees that have rendered judgments of this candidate. But listening to the grievance, the hearing officer realizes that the faculty member was not given adequate warning of the perilous nature of his situation and the chair and the dean express their confidence in this person's abilities as well as regret over the circumstances. The person is a good teacher. The college president might be convinced that if the faculty member is reappointed, and a strongly worded letter of guidance is placed in the faculty member's file, the college will then be on much stronger ground if the faculty member still has not produced sufficient scholarship by the next reappointment consideration. Also, a letter clearly advising that faculty member of what is expected provides the grievant with a fair chance of meeting the required standards.

Sometimes the use of the grievance machinery can save the institution some embarrassment as well as lead to a positive outcome. Consider this example. An associate professor, considering putting himself up for promotion to professor, seeks his dean's advice. The dean responds that he/she believes the candidate's record would be much improved if he had additional scholarly publications. The candidate accepts the dean's advice and after two more articles have appeared presents himself as a candidate for promotion to professor. The candidate passes the first level of review just before the dean leaves the institution. In the fall, a new dean arrives and his judgment about the candidate is different. The new dean did not know about the former dean's advice. The candidate's promotion is denied. At the Step 1 grievance hearing the former dean, still in the university and in a highly prestigious role, appears indignant, to testify to the inconsistency of the college's behavior and to say that this candidate had done everything one could have expected and warrants promotion.

The new dean, sincere in his evaluation of the candidate, wanted to make his statement about high standards. Confronted, however, by the full set of facts, and the former dean's determination to support this candidate, the new dean and the president review the matter with the hearing officer and find that there are procedural grounds on which to grant the grievance and promote the candidate.

The grievance process enables the parties to learn from each other. What management learns may make it comfortable that its judgment should stand or may lead it to find that its judgment should be reversed. The positive results of a willingness to really listen, to hear, and to grant a grievance or seek a settlement may bring about improved morale, may correct an inequity, and may identify and eliminate misunderstandings.

III. FACULTY COLLECTIVE BARGAINING AT TWO-YEAR INSTITUTIONS

A. A Union View of Faculty Collective Bargaining at the Two-Year Institution

B. A President Speaks on Faculty Collective Bargaining At the Two-Year Institution

FACULTY COLLECTIVE BARGAINING AT TWO-YEAR INSTITUTIONS

A. A UNION VIEW OF FACULTY COLLECTIVE BARGAINING AT THE TWO-YEAR INSTITUTION

James Rice, Professor
Quinsigamond Community College
Secretary/Treasurer
National Council for Higher Education, NEA

There is an ancient Chinese proverb that states, "You cannot step into the same river twice." Change is the constant ingredient in life. And so it is with the topic, "Higher Education Collective Bargaining: Back to Collective Bargaining Basics," change is obvious, but is the change in the basics, the circumstances of bargaining, or a combination of the two?

The collective bargaining basics may be sufficient provided that the practitioners remember that no two bargaining experiences are the same and the practitioners have an effective model for handling conflict. Also, we as union leaders must recognize that organizations are influenced by social and political conditions. Organizations have complex roles and their choices influence the fate of any movement. In addition, organizations may flourish and die down cyclically over time. Across the cycles, the nature, structure and rhetoric of an organization may change. Organizations may follow any number of trajectories or combination of trajectories. One common trajectory is routinization and centralization as the organization develops patterns of action and an entrenched leadership group takes control. Other trajectories may include cooptation, demise, radicalization, schism and stagnation.

No bargaining statute ever gives the union the upper hand. Therefore, bargainers must combine limited power and unlimited intelligence; apparent inaction with decisive action; and be constantly aware of the changing circumstances and remain capable of developing new strategies as fresh challenges arise.

Traditionally, higher education bargaining from the employee perspective has been to organize, bargain, and establish a political action program. Bargaining is cyclic and predetermined by the expiration of the existing contract. One look at

the current political, social and economic climate is enough to conclude that the collective bargaining organizations cannot continue doing "business as usual."

THE MASSACHUSETTS EXPERIENCE

From 1982-92 I served as the President of the NEA's thirty- sixth largest local, the Massachusetts Community College Council. In this ten year period the MCCC utilized an effective model for handling conflict by surviving a decertification vote and then negotiating three successive contracts that included the following:

- pay raises totalling 36 percent, 24 percent and 13 percent;
- tuition remission for faculty and professional staff members, spouses, and dependents at all public institutions;
- creation of a health and welfare trust fund for faculty, staff, spouses and dependents;
- an arbitration standard of "arbitrary, capricious, or unreasonable;"
- establishment of a Joint Study Committee composed of union and management representatives to discuss, study and recommend changes of mutual concern during the life of the contract.

In addition:

- a sex equity suit settlement of eleven million dollars;
- creation of a part-time and evening adjunct units;
- establishment of fact-finding as an effective means to resolve disputes;
- defeat in the courts of the Governor's furlough program for higher education employees;
- the first strike in Massachusetts higher education involving the adjunct contract.

In addition, there was also an abundance of unselfish behavior, serendipity, and good luck on the part of many faculty and professional staff who volunteered their time and talents to improve salaries, conditions of employment and the quality of education to the students of Massachusetts.

The external bargaining variables impacting this same time period were as follows:

- a booming Massachusetts economy;
- a restructuring of higher education into the Massachusetts Board of Regents;
- state budget surpluses up through 1987;
- tax breaks to businesses;
- generally positive support of Massachusetts public community colleges by the public and elected officials;

- other higher education units lobbying against settlements different than their own.

The MCCC, for its part, utilized the following collective bargaining basics:

- a team leadership concept in conjunction with the Executive Committee, Coordinators, Board of Directors, fifteen campus leadership, and the memberships at large.
- a list of do-able short-term and long-term goals. For example, in the negotiation preparation process, the membership was surveyed for goals and objectives not specific contract language. The membership acquired a "buy in" through ideas and expectation. The process was decentralized and the "asking package" became the "demand package."
- knowledge of constituencies. Internal constituencies included membership, state affiliate, and national affiliate. External constituencies included the executive and legislative branches, appointed bureaucracies, trustees, college presidents, public opinion.
- vigorous activity in the following forums: grievance/arbitration, State Labor Relations Commission, Mass Commission Against Discrimination and the courts.
- utilization of available technology: computers, faxes, car phones, polling (internal/external), maintaining media identity through print and radio ads, bumper stickers, and bookmarks.

These successes reflect the ability to develop new strategies as challenges arise.

WHAT ABOUT BARGAINING TODAY?

The list is not endless, but consider some of today's issues:

Restructuring Higher Education
State Policies and Budgets
Accreditation Agencies
Administrative Issues
Trendy Managerial Panaceas (TQM)
Ideological Attacks (The right outnumbering the left)
Graying Professorate/Early Retirement
Workload/Productivity (Teaching, Publication, Research)
Outsourcing/Downsizing
Political Correctness
Cost Shifts (Health Care)
Cost Shifts (student tuition and fees)
Salaries and Benefits

Circumstances surrounding collective bargaining have changed dramatically. For instance, consider the issues of salaries, academic restructuring, and state policy and budget developments.

SALARY AND BENEFITS

This is a strange time. The first two digits of the faculty or staff member's age usually exceeds the first two digits of their salary.

John Lee reports, in the 1996 Higher Education Almanac, average faculty salaries, uncorrected for inflation from 1972 to 1994 went from $13,850 to $47,974 or an increase of 246 percent. But adjusted for inflation, the average faculty member salary in constant dollars declined $700 or 1.4 percent from $48,673 to the $47,974 (Almanac, 9).

Also, community colleges employ 55 percent of all part-time faculty who are paid an average of $7,220 per year. The gap between community colleges, four-year and university institutions continues to widen. The 9/10 month contracts, 1994-95 indicate the four-year colleges in Massachusetts average $52,826 while the community college average is $39,980 (Almanac, 12).

The current Massachusetts salary settlements through 1997 will average around $58,108 for four-year colleges, exclusive of the university level, and $43,978 for the community colleges or a difference of average salaries of $14,130 between the two- and four-year colleges.

The problem of salaries is threefold: maintaining or exceeding the cost of living, the ever widening gap between public two-year institutions and four-year public baccalaureate institutions, and how to fund any negotiated pay increases.

ACADEMIC RESTRUCTURING

In Massachusetts, statewide restructuring of higher education is frequently accomplished by the legislature in conference committees or outside sections of the budget. The restructuring occurred in 1976, establishing Central Segmental Boards; 1982, creating Massachusetts Board of Higher Education; 1990, securing the Higher Education Coordinating Committee; 1996, proposed, Higher Education Board. Faculty or union participation was is at best minimal.

Campus reorganization, mission review, academic unit reorganization, and program consolidation or expansion has somewhat more faculty participation and the union response is usually reactive and governed by (RIF) reduction in force contract articles or unit determination rulings at the Massachusetts State Labor Commission. The consequences of these practices is often painful and inefficient, and leaves a legacy of a hostile labor environment.

Management and the employee representative organizations need to radically rethink traditional sphere of interest-management rights and union-protected due process to assure a more participatory restructuring process (Almanac, 56).

In Massachusetts we have tried to make contracts living documents which contain vehicles for discussion of problems of mutual concern; address issues which require in-depth study and discussion; explore and identify root causes of current problems between the parties with a view of resolving all such problems; and make recommendations to bargainers to the current contract or new contract (Agreement, p. 11).

The restructuring at the system level should be done by fully represented commissions with recommendations to the legislature, not by the governor, nor the legislature, or outside budget language. Ideally, restructuring should be done with unions thereby fostering rather forcing change.

STATE POLICY AND BUDGET DEVELOPMENTS

The National Education Association (NEA) commissioned the Educational Systems Research in Littleton, Colorado, to develop and conduct the state legislative Higher Education Issues Survey (HEIS). Sandra Ruppert produced the report, "The Politics of Remedy: State Legislative Views on Higher Education." The report is based upon telephone interviews with 58 house and senate education committee chairs in 49 states except Wisconsin. The object was to gain insight into the values and attitude of legislators concerning higher education. The report describes general trends drawn from the responses of legislators.

Some relevant community college highlights:

- Improve partnerships with K-12, i.e., workforce preparation;
- Remedial coursework and the number of students is a concern of most legislators;
- Community colleges are seen as the critical point of access to higher education. Legislators (71 percent) feel more students should be routed through community colleges;
- Many legislators hope to create new decentralized systems modeled on K-12 reform initiatives.

In Massachusetts, the budget for higher education labors under continued cuts; competition exists with other agencies especially k-12 and prisons. The tax cutting measure "2 1/2" restrains city and town taxes while at the state level business tax breaks to stimulate the economy have enjoyed increased popularity.

In 1994, Governor William Weld of Massachusetts received 71 percent of the vote while promoting less government in every policy initiative. In addition, with the assistance of a democratically controlled legislature, the state income tax was cut, the estate tax was phased out, taxes on certain services were eliminated, aid to cities and towns was reduced by 270 million dollars, 8000 workers were cut from the state payroll, mental health care was contracted out, and the general relief fund (welfare) eligibility was restricted. In higher education, James Carlin, Chair, Higher Education Coordinating Council; John Silber, Chair, Board of Education,

and Governor Weld are casting themselves as the enlightened leaders of education for halting the "dumb-down" trend in education. The message and its spin includes:

- money will not solve the problem;
- accountability and results, not social engineering and political correctness;
- limit remedial courses (2-year, 4-year);
- cut skyrocketing tuition;
- downsize by eliminating duplication, waste and outmoded programs;
- eliminate education bureaucrats;
- create competition by set aside, award funding pools.

PROSPECTS FOR THE FUTURE

How do we survive this century intact? A strong faculty union is one guarantee of a secure future. A strong faculty union constantly aware of the changing circumstances and capable of developing new strategies to secure contract agreement is additional insurance.

Positive influences impacting the bargaining process include:

- high school graduates are about to climb toward record highs peaking in the year 2008; and
- there is and continues to be a shared consensus for the role for community colleges as the source for remediation, job training and transfer.

Two popular trends, one, creating decentralized systems, and two, funding formulas linked to performance mechanisms are problematic but workable.

Most problematic are the concerns as to whether broad access to higher education should be maintained and whether the promise of technology can meet the challenges of providing quality education to a growing and diverse group of students.

As for collective bargaining basics, unions must maintain a constant awareness of change and create the capacity for developing new strategies.

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FACULTY COLLECTIVE BARGAINING AT TWO-YEAR INSTITUTIONS

B. A PRESIDENT SPEAKS ON FACULTY COLLECTIVE BARGAINING AT THE TWO-YEAR INSTITUTION

Salvatore G. Rotella, President
Riverside Community College

Three years ago at this very conference in 1993-94, speaking on collective bargaining in the community colleges in California, I indicated that we were going through "administrative and fiscal turbulence"[1] and that therefore any conclusion or prediction based on the prevailing situation could be, at best, provisional and short term. The turbulence is over; undoubtedly the state of California has settled in what some may consider more "normal" times, but unfortunately, it is a normalcy that hardly resembles the status quo ante, the late eighties.

In this presentation, it is my thesis that the state of public higher education, and especially community colleges in California, is such that to expect anything from collective bargaining other than the very marginal, college administrations and unions must seek totally new premises on which to base the collective bargaining of the future.

WHERE WE ARE IN COLLECTIVE BARGAINING

To date throughout most of the country, collective bargaining has functioned incrementally to the benefit, economically and professionally, of unionized full-time faculty in institutions of public higher education, including community colleges. Successive contracts have kept salaries competitive and have improved working conditions. The low inflation rate has mitigated the impact of the fiscal crisis in the last few years when a number of institutions had to forego any across-the-board salary increases. As a result of wise money management and much belt tightening, the trustees of my own institution have been able to give small but continuous across-the-board increases even in the last four years; such increases plus the regular step increases for those not at the top of the scale, have meant keeping up with, if not inching somewhat ahead of, the cost of living.

Working conditions are fairly homogeneous and have remained somewhat stable throughout the country. Workloads are tempered by class size maxima as

well as load reductions for courses such as English composition, which require intensive involvement on the part of faculty to correct papers. Fringe benefits, especially health insurance are generally comparable to other industries; some institutions have been more imaginative than others in providing cafeteria-type plans. Faculty enjoy academic freedom, often protected in the collective bargaining contract. The sanctity of the teacher-student relationship is generally honored.

Institutions enjoy the services of qualified faculty. Contracts or state law, as is the case in California, guarantee faculty participation in governance. The tension between faculty and administration is less prevalent than it may have been years ago when the community college movement first emerged. Tension between faculty and some boards of trustees still exists here and there, and in spite of the gravity in some cases,it is more the exception than the rule. The only large community college system, Chicago, which had a twelve hour load per semester, recently had to give in to the standard fifteen for new hires. Given the rate at which senior faculty are leaving, the fifteen credit hour per semester is the norm -- even in Chicago.[2]

With limited funding from state government, increases in wages often had to be justified on the basis of greater productivity, which traditionally has taken the form of increased workload, more teaching hours, or larger class sizes. Unfortunately, for a variety of reasons, some of which will be mentioned briefly later, such "productivity," in the traditional sense, is no longer a realistic option. In fact, community colleges throughout the country may have reached, if not surpassed, those limits years ago. One advantage community colleges offer is the personal attention teachers give students in small classes compared to institutions where first and second year students sit in large lecture halls with three to four hundred individuals enrolled.

This is the experience in my own institution, and I do not believe it is atypical. Demand for classes far exceeds the supply; in fact, we have been operating under a state "cap" for lack of funds. The faculty, in spite of the prescribed class maximum, is so sensitive to student demand, and so accommodating that often the number of seats in the classroom, or that can be brought into it, becomes the operating maximum. It is not uncommon in a social science class, an area I know best -- and I too have given in to student pleas for admission -- to have fifty to sixty students. Multiply this number by five and you get an idea of the total number of students a faculty member is responsible for per week. I believe that the desirable individual student-faculty contact is reduced under these circumstances. Not even the most photographic mind could remember but a handful of faces and names. For many institutions, the open door concept, that other hallmark of community colleges, has been shut *de facto* for quite some time. This is true in institutions like mine located in a student population growth area at a time of diminishing resources.

And let us not forget that the students who enroll in our institutions are more and more in need of basic skills and supportive services. The situation is

such in California, that one of the other segments of higher education came close to declaring war on under-prepared students by threatening to bar them from admission. Some members of the Board of the California State University, forgetting that their system prepares most of the teachers for K-12, literally declared war on themselves by threatening to dump on community colleges all students in need of remediation. A popular newsletter summarizes the situation this way "Poor tests from California State University freshmen . . . show a large number are not ready to handle freshman English or math. That's on top of other evidence [that] public schools are failing . . . students, parents, colleges and employers who need a skilled work force."[3]

THE FINANCIAL PICTURE

Sources of funding for public higher education are drying up. Proposition 13 in California, shifted funding and decision-making power away from the local Boards of Trustees to the state. Lately, whatever local tax funds are still available, have been coming in short because of the precarious real estate situation. As is to be expected, students resist paying more tuition. In fact, even if the current California $13 per credit hour tuition were to be tripled, thus bringing it in line with the low end tuition states, there is doubt whether it would yield enough to make up for the many funding deficiencies. State funds are needed to supplement uncollected local taxes. Also, growth is not uniform throughout the state. Institutions with stable or declining enrollments must pay their tenured full-time faculty and maintain large operations. Institutions in areas of growth need more funds to serve new students.

Scarcity of funds in the last few years has spared no type of institution and no situation. In spite of legislation establishing ratios for part-time to full-time faculty, in some departments better than half of the courses are taught by part-timers who divide themselves among three or four colleges and end up spending the bulk of their time on the highway. The magnificent master plan of the California higher education system which promised every deserving Californian the benefit of higher education, to the envy of the entire world, is but a dream of the past. Undoubtedly it had much to do with the strength that California enjoys among the economies of the states and of the world. But the dollars to make that dream real have not been available in the last five years or so, and, in the estimation of one of the most astute legislative analysts of the state, they are to be found no where in the foreseeable future. There is no way state revenues can be juggled to give more to higher education. In fact, if the current situation of state revenues and expenditures is projected into the next seven years, higher education will be squeezed out by other state functions. New taxes in California and elsewhere are out of the question; some analysts, in fact, fear taxpayers revolts.

A recent report of the Higher Education Policy Center, prepared by David W. Breneman, was highly criticized by many for the remedies it advocated to overcome the current state of emergency, but received no criticism for its assessment of the state fiscal situation for the years 1995 to 2002. Given the

population growth of California and the state revenue and expenditures, Breneman predicts that by the year 2002 constitutionally mandated functions such as K-12 education, corrections, health and welfare will absorb the lion share of revenues and leave only 4% of the state revenue for higher education. This would constitute a 2/3 drop from the 13% share used currently.[4]

One need not mention the additional squeeze from the reduction of federal funding which will affect all three systems of higher education in California. For community colleges, it will mean an end to funding for institutions that are experiencing change in the population served, and an end to curriculum innovations and other kinds of educational experimentation.

There is no need to belabor further the critical economic situation of public higher education and especially community colleges which more recently have been recognized as an engine of economic development and the ideal institution to prepare a skilled workforce. Boards of trustees have no more funds for the essential functions of the colleges entrusted to them. It has been painful to sit at the bargaining table and say no to anything that costs money. There are not that many non-money issues left to be resolved. Building repairs, construction of new facilities, augmentation of library collections, student support services can be neglected for just so long; then the time comes that serious crisis sets in and money must be diverted to these non-faculty needs.

A NEW PARADIGM

In the long run, the solution to the current situation may lie in approaching the problem of just compensation for faculty from a different perspective. So far compensation has been based on credit hours generated, number of classes taught, number of students per class. The emphasis has been on teaching, and it is well known that for a variety of reasons, mainly overworked faculty and under-prepared students, teaching no longer yields the results that it did when classes had fewer students, most of whom were academically prepared and had a better sense of direction than students today. Evidence is growing that, given the difficulties of many of our campuses, learning may be on the decline.

In addition to a severe scarcity of resources, community colleges may also be facing a problem of public confidence about the efficiency and quality of their operation. The two problems are not unrelated. While results can be generally guaranteed for the few who complete degrees or certificates, many leave after attempting a few courses, or trying to remedy the deficiencies that prevent them from entering a regular college-level program. Given our mission to provide higher education for all those who can benefit from it, and the need of society for a serious expansion of education beyond the secondary level, these are serious considerations if we expect continued and much-increased public financing.

A new approach must be developed that takes into consideration not only the work of faculty but also the amount of learning experienced by the student.

In the literature, this has been referred to as "learner" productivity.[5] The paradigm I am advocating would switch emphasis from teaching to learning, or combine the two. To bring about this new reality a considerable investment of resources is necessary; it cannot be obtained by just willing it. The expenditure curve would go into serious deficit before it moves up to positive results. Such a revolution, and I believe it would be a revolution, can succeed only if our faculty and their representative organizations, including unions, provide the necessary leadership. There is no need to revolutionize the entire institution. Part of it can continue along traditional lines, but part must change. The change cannot be global in nature. The approach must be college by college, program by program, course by course, as faculty see the need and the opportunity for change and they themselves are prepared for it.

Many of the trappings of the existing structure may have to be abandoned. Technology can become the vehicle of delivering knowledge under the guidance and supervision of faculty who will certify the attainment of knowledge.

Given the reality of student preparedness for college work today, community colleges as part of their mission have a responsibility for remedial education. Part of this mission also includes preparing people with limited knowledge of English for college-level work. Recognizing from the outset that there are many levels of remediation, there is no doubt that what is involved here is the need for imparting basic reading, writing and mathematics skills. Each institution ought to establish a clear level of skills required for college level work; in fact, it would be best for all concerned to demystify preparedness for college. There must be a clearly demonstrable point at which a person is ready to do college-level work. Since, in many cases, the lack of intellectual skills is concomitant with a lack of habits appropriate for doing academic work, the two goals must be joined. The responsibility for moving toward success must be placed squarely on the student. Through interactive technology, there is much that can be done to bring students to an accepted level of proficiency. I am confident that our faculty can prepare the necessary software for new courses and programs of study. Packages must be prepared in such a manner that the student is required to give considerable time and effort to the program. It is hard to see how remedial courses can be held on a college schedule of three fifty-minute sessions per week. It may be more appropriate to have programs of study that call for substantial immersion, day in and day out attendance, and a self-paced method of instruction.

The faculty must remain central to this new enterprise. First of all it is their responsibility, individually or in teams, to develop new materials and programs of study. Their time must be properly compensated and their rights as authors clearly recognized. Second, they need to work with groups of students to explain the program and to induce them to work with it. Third, they must act as guide and facilitator when the students encounter difficulties. Fourth and most important, they must pass judgment and certify that the student has achieved pre-established goals. Technology can also be used in many basic college-level courses, regardless of disciplines, where basic skills and concepts are involved. Such skills can then be integrated by the faculty member in the more advanced part of the course.

The assumption, if there is one, upon which college offerings are structured today seems to be that all students learn in the same way and in the same manner. It is much like a mass production approach. Unfortunately, we know quite well that community college students come with disparate levels of preparedness, interest and motivation. With the aid of technology, they could make up the deficiencies, so that they can fully benefit from courses. Finally, distance learning is another aspect of technology that can be used especially in areas such as ours where many students cannot enroll in required classes for lack of space. Not all students should be advised to take distance-learning classes; the drop-out rate is incredibly high. However, especially as students have been initiated into the intricacies of college life, some of them could very well benefit from one or two TV courses as an integral part of their program of study. Studies show that if the material is properly structured and guided, those who persist benefit from these courses just as much as students who have taken traditional classes. Unfortunately distance learning and technology based educational programs are often treated as cost saving. Most institutions, including mine, are not ready for technology or distance learning. A massive investment must be made to prepare the faculty to adopt new approaches and to have each institution prepare, or choose, its own materials. I am convinced though, that eventually productivity, i.e. learner productivity, will increase substantially.

I have spoken of revolutionizing our approach to productivity. Maybe the idea is not so revolutionary after all. It places emphasis on the learner and on ways in which the teacher can facilitate the learning. The first teacher, Socrates, was careful about the knowledge he delivered and the way he delivered it. But ultimately he was most concerned with how well his students assimilated his teachings.

In conclusion, the new productivity that I have barely sketched out is possible. It could become the source of new funding, and a new dimension in the collective bargaining process. Unquestionably it is going to be an expensive investment, but it will pay dividends. If Secretary of Labor Robert Reich is correct about the requirements of the new workforce, this new productivity would do much to guarantee the smart and highly skilled workers of the future. I feel confident that change need not come all at once. And even if we succeed, traditional and non-traditional education can and will coexist. We are only talking of the immediate future; let succeeding generations of faculty and administrators worry about the long-term. Some of the trappings of higher education such as the fifteen hour load for all faculty, the fifty minute lesson for all students must give way to more appropriate means of accounting for the time of both faculty and students. If public higher education is truly in a state of emergency, an all-out effort must be made to rescue our colleges and universities not so much from extinction but from inefficiency and ineffectiveness. Ultimately, we will be rescuing generations of students, who, unless something drastic is done, will go on gaining credits and diplomas but very little education.

ENDNOTES

1. The concept of "turbulence" in administration has been treated extensively by Peter F. Drucker, Managing in Turbuent Times, Harper and Row, New York, 1980

2. Chicago, perhaps, remains the most troubled system in the country. Many years of political intrusion in the system, the use of the board as a vehicle for the search for personal power on the part of some trustees, and the interference with the role of administration are at the heart of the problem.

3. "The Kiplinger California Letter," April 3, 1996

4. David W. Breneman, A State of Emergency?, Higher Education in California. A Report Prepared for the California Higher Education Policy Center, January 1995

5. D. Bruce Johnstone, Working Papers in a Time of Fiscal Crisis, State University of New York, Albany, 1990

IV. FACULTY COLLECTIVE BARGAINING AT PRIVATE INSTITUTIONS

A. Bargaining Under the Shadow of *Yeshiva* at Hofstra University

B. Faculty Collective Bargaining at Adelphi University

C. A Genuine System of Collegiality Would Tend to Confound Us

FACULTY COLLECTIVE BARGAINING AT PRIVATE INSTITUTIONS

A. BARGAINING UNDER THE SHADOW OF YESHIVA AT HOFSTRA UNIVERSITY

Estelle S. Gellman, President
AAUP, Hofstra University

Comparing the situation of my colleague from Adelphi University to the situation we face at Hofstra University is like comparing pickles to ice cream. Although my choice of analogy may make you wonder if I am pregnant - I am not, although it is my son's birthday today -- I think the analogy is particularly apt. It would not be far off the mark to describe the relationship between the faculty and administration at Adelphi as being as sour and bumpy as a pickle; while the relationship between faculty and administration at Hofstra often appears to be as sweet and smooth as chocolate ice cream. The atmosphere at Adelphi is so different from that at Hofstra that you can feel it, you can almost taste it, when you go on campus but, as different as the atmosphere may be on each of our campuses, we both bargain under the threat of decertification. The threat may be more overt at Adelphi but it also lurks at Hofstra. We have not had a single negotiation in which the spectre of Yeshiva has not been raised.

Every time we have struck -- and we have struck a lot -- the rumors have been rampant, the fires having been stoked by members of the administration who "leak" the information, most of which is wrong. I have lost count of the number of times I have been on the picket line and have been told, with absolute assurance, that tomorrow we would all be getting individual contract letters, and that anyone who did not sign would be dismissed. And, furthermore, there would be some of us -- and everyone knew who -- who would be getting letters with demeaning salaries and assignments. Has it ever happened? No. Does that make a difference? No.

Five years ago we had one of the most congenial contract negotiations that I can ever remember -- we started talking informally over a year before the previous contract expired; we began formal negotiations over seven months before the contract expiration date; we spoke civilly to each other and negotiated through pleasant meals together; we brought each other birthday cakes and matzohs; we tackled problems and shared information in as honest and above-board a manner as I have ever seen and, in a real first for us, we came to an amicable agreement that advanced the goals of both sides two months before the previous contract

expired. Who would expect a Yeshiva threat in a situation such as that? Certainly the word, neither as a noun or a verb, ever passed the lips of the administration negotiating team. But, when things seemed to be going so well that we agreed to try for a June 1 conclusion of negotiations on a contract that would become effective on September 1, the department chairs and deans were called to a meeting at which they were allegedly told that if the faculty did not agree to the administration offer by June 1, they would Yeshiva us. So much for congeniality. I do not know why they did it or just what it was that they expected us to do? Perhaps they did not think congeniality would be tough enough and wanted to show that they could still flex their muscles. They may have felt they needed a show of strength to frighten us into asking and settling for less. Perhaps they were just concerned with their image and were afraid of not being seen as forceful enough. It really does not matter though, we had and still have no choice but to continue what we are doing. And they continue making sure that we get the word that they have not forgotten what Yeshiva means. We have not. It is always there.

We are once again in negotiations and they once again seem to be progressing well. The atmosphere is just as congenial as last time and, similarly to last time, we have been once again "leaked" the information that there are those who have the ear of the president who want nothing more than to "Yeshiva" the faculty. We do not know if the source of the leak is the president, his advisory council, the board of trustees, the negotiating team or even a dean or chairperson or faculty member who overheard something he or she thought we ought to know. Are the leaks a strategy, a conspiracy planned to cow us, or are we at the other end of a game of telephone begun by a queasy faculty member or administrator acting on his or her own? We do not have a clue and it really does not make a bit of difference. We continue to define our goals, bargain for them in good faith, and hope to settle without a strike. Unless there is a real move toward decertification that requires our response, we ignore the leaks and threats. If the move were made, we would respond as have our colleagues at Adelphi. As long as it is not implemented, we continue to negotiate and do our best for the faculty.

But what is it that we have to do? What do have to do differently from those of you who know your right to negotiate is not at issue? To put it in a nutshell, we simply assume that we do not have the protection of the NLRA and act accordingly. We assume that we cannot turn to the NLRB with charges of unfair labor practices and that, if the administration were to be foolish enough to try to Yeshiva us, they might succeed. In other words, we have to rely on ourselves rather than the authority of an outside body to insure that the administration will bargain with us and bargain fairly. And what do we do to insure that? What we do is no different from what any bargaining unit would do -- we put a great deal of effort into building unit solidarity and we come to the table with strength and with knowledge. We make it clear that it is in the interest of the institution to negotiate with us rather than decertify us and we trust that they will be rational in how they respond. To meet the challenge, you need skillful negotiations backed by a strong and united faculty.

We are very careful in selecting both our negotiating team and our negotiations steering committee. Although some private institutions may do things differently, we do not have paid staff to do our negotiating and we do not use attorneys at the table. We did use attorneys at one time but were not happy with the process. We feel that it is the faculty who best understand the complexity of the institution and can best represent our needs. We have been very satisfied with our recent contracts. We feel that our wages have become more competitive, that we have a relatively good benefits package, and that our working conditions have been improving. Our last contract included a reduction in teaching load and although we paid for that with an increase in class size, we negotiated appropriate limits that would maintain the educational integrity of courses and the appropriate role of faculty in the decision-making process. We have a very strong and comprehensive governance structure that is incorporated into the contract and protects the faculty role in governance.

Ironically, it is that very protection that would put us at peril were we to go before the NLRB. I will grant that I am biased, but I think that there is a basic misconception in the Yeshiva decision. The Yeshiva faculty were deemed to be managerial essentially because of their role in governance, because their recommendations appeared to carry such weight in areas such as curriculum, standards, appointment, tenure and promotion decisions. When we think of a managerial employee, however, we think, or at least I think, of an employee who is individually responsible for making management and personnel decisions within a particular sphere of authority and who is then evaluated on the basis of the consequences of those decisions; that individual has managerial responsibility. That is not what faculty governance is all about. We do not advocate, and do not protect in our contracts or faculty handbooks, the managerial responsibility of individual faculty. We protect shared governance -- we protect a system in which the individual faculty member is responsible to his or her own conscience and professional ethics for contributing professional expertise and judgement to a group recommendation. It is the weight of the group recommendation that is protected and the right of the faculty to contribute to that group, not the managerial authority of an individual faculty member. Professional employees are protected under the Act and I believe that the role of faculty that we protect is part of the faculty member's professional responsibility and that exercising that professional role does not make a faculty member a managerial employee. It does not make a faculty member a managerial employee in a public institution. Our colleagues exercising the same professional responsibilities in the public sphere have not had their right to collective bargaining challenged. Why should it be any different for us? But that is my opinion, although my opinion is shared by others. As a matter of fact, I was a member of the AAUP taskforce that developed language to that effect that was submitted to the Dunlop Commission and included in their recommendations. In the current political climate, however, it is unlikely that those recommendations will be enacted anytime soon. And so, for responsibly exercising our professional responsibilities, we are subject to the threat of a Yeshiva challenge.

How does that impact on our bargaining? First of all, since a strong faculty role in governance is more likely to lead to a Yeshiva challenge being upheld, one

might think that we do not aggressively bargain for those protections. That is not the case. We bargain very forcefully to protect the faculty role in governance and, in fact, hope to make even more advances in this area. We are fortunate that we have an administration that not only recognizes the legitimacy of that role but understands that it is in the interest of the University to gain the benefit of faculty expertise in these areas. We understand, of course, that administrations may change and we cannot trust our protection to the good sense of an administration that might change at any time. There are some among us who sometimes get rather paranoid. I have been warned that maybe the administration is willing to give us governance protection because it will put them in a better position to Yeshiva us, but we have not given in to that kind of paranoia. We feel that our governance rights are legitimate and need the protection of a contract. And although we are very much aware of Yeshiva, we try to thwart the threat in other ways.

The Yeshiva threat does not as much affect the issues that we negotiate as it does the way in which we approach negotiations. I doubt that the process is all that different from what it is for faculty who do not have to face Yeshiva, but I suspect that we may be more deliberate in what we do. We are constantly in the shadow of Yeshiva and very much aware of our approach. As does any union, we want to encourage the administration to negotiate with us. We believe that it is in their interest to do so but we are not always so sure that they see it the same way that we do. In our case, though, if they decide not to negotiate with us, they may be able to avoid it, they may be able to decertify us. Our job is to make sure that they know that the process of decertification would be more disruptive than it would be worth, that the negative outcomes would far outweigh the positive.

Our approach is twofold: 1. to do everything we can to keep negotiations going forward, and 2. if the administration tries to thwart that, to develop the strength we need to make the consequences of a Yeshiva challenge too unpalatable for them to risk. We do what we can to keep negotiations reasonable. We are there to get a decent contract; we are not there to show how strong we are, to embarrass the administration or to belittle them, to show them who is smarter, or to play games. We do not want them to find the process so unproductive and disruptive that it would be reasonable for them to abandon the attempt. Were the administration truly considering a move toward decertification, that type of provocative behavior would encourage them. It is not simply a matter of encouraging them to retaliate against us, however, but of us losing the only leverage we have -- our credibility with the faculty and the outside community. If the administration were to refuse to negotiate or to sidetrack negotiations we would not be in a position to appeal to the NLRB. We know where that path would take us. Were the administration to act in bad faith, we would have no recourse other than to attempt public persuasion, or embarrassment, and, as a last resort, a job action. Were we to lose our credibility, however - we would jeopardize those options. We have to be credible, but credibility without strength will get us nowhere, and our strength lies in our credibility with the faculty.

It is essential that the faculty who represent us be credible not only with the union membership but with the administration. Although we have not faced overt attempts to discredit the union negotiating team in recent years, we have been through it before. We have to show the administration, as well as the faculty that we represent, that we are not only reasonable but have a full understanding of the financial status of the University, that we understand the costs involved with all of the proposals that cross the table, and that we are knowledgeable about issues relating to working conditions and benefits. We cannot take the risk of our proposals or responses being unreasonable and inconsistent with reality. I am not stating anything new or startling. We all need credibility to negotiate effectively. In our case, though, it is not only that we want to negotiate advantageously for the faculty but that the risks are higher. We are risking more than a contract with less than optimum terms. If we lose our credibility, we may lose our bargaining unit.

But credibility and rationality does not mean lack of forcefulness at the table or agreeing to proposals that compromise the faculty. We would not have the support of our faculty if they felt we were going to sell them down the river to avoid a Yeshiva challenge. Although we would not get the support of our faculty if they see us as a bunch of rabble rousers who do not know what we are talking about, neither would we get their support if we are seen as too conciliatory or afraid to confront the administration. I am sure it is no different with any other union, but it is especially important for us to develop the credibility that makes the administration take us seriously and gives our membership confidence in what we are doing.

That credibility does not come overnight. It comes from integrity and proficiency in representing faculty and a record of responsive and responsible leadership. Our strength during negotiations builds on what we do at other times. We vigorously enforce the contract and protect the rights of faculty; we are accessible to faculty with concerns; we provide strong representation in regard to grievances; and we actively promote leadership development and continuing communication on the issues we are facing. We make sure that the faculty are aware of what we are doing and try to build a sense of unity and common cause.

Building strength means building confidence. We put a great deal of time and energy into building the confidence of both our membership and the administration that we are knowledgeable, reasonable, honest and fair, that we will forcefully stand up for what we believe is right and that, when we do so, we will have our facts behind us. Once a contract has been signed -- and we signed and are likely to again sign a five-year contract -- the overt threat of Yeshiva is dormant for a while. A unit clarification petition needs to be timely - i.e., submitted at a time when negotiations would be in order. To be adequately prepared for the threat when it is timely, however, we cannot lie dormant when it is not. That is when we work on building the confidence and strength we need to negotiate effectively.

Then, when it comes time to negotiate, we build on what we have done. During contract negotiations, we make a special effort to communicate with the membership. We have countless meetings and distribute innumerable questionnaires to find out their concerns and let them know how things are going. We encourage wide involvement in the development of priorities and positions and make every effort to balance competing interests. We do not hide from the Yeshiva threat and we do not pretend it is not there. Particularly in these times of fiscal uncertainty, our faculty are concerned. Rumors are always rampant and it is our responsibility to address the fears of faculty. We put considerable effort into educating our faculty about what Yeshiva means and how we might affected. We also emphasize the need for unity and strength.

Even though we have no desire to strike and hope to avoid one, our main focus is on building the strength that would be needed for a strike to be effective. We have to know, and we have to let the administration know, that we are capable of sustaining a strike that would disrupt the semester. We have been fortunate. We have sustained several strikes in which only a very few faculty met their classes. Our history in that regard makes it easier to convince the faculty that, if they do go out on strike, they will have the strength of numbers. It also gives the administration pause for thought about the consequences of bad faith bargaining or a Yeshiva attempt; they may win the battle at the NLRB but lose all the gains that the University has made in recent years. We do not want to strike and we will not ask for a strike unless we feel that we have absolutely no alternative. But, we need the strength to strike in order to avoid one, and make it impractical for the University to begin Yeshiva proceedings.

Although the administration is more likely to be willing to negotiate with us if we are reasonable and credible, that does not mean that they might not still prefer to do what they want without the restrictions of a contract. They may be truly benevolent and believe that they could further the interest of the University if they did not have to go through the sometimes convoluted procedures required by the contract. Were that the case, the credibility of our proposals and our understanding of the institution would not mean a thing. Credibility is a necessary but insufficient criterion for success. To bargain under the shadow of Yeshiva, the most important element is strength. And if we are going to succeed, our most important task is to develop the confidence and strength of our bargaining unit.

FACULTY COLLECTIVE BARGAINING AT PRIVATE INSTITUTIONS

B. FACULTY COLLECTIVE BARGAINING AT ADELPHI UNIVERSITY

Stephen Goldberg, Immediate Past President
AAUP, Adelphi University

Given the general topic of "Back to Collective Bargaining Basics" and the situation faced by the faculty of Adelphi University I thought I would make a presentation which is more anecdotal than scholarly. Adelphi University is now celebrating its centennial year. A local chapter of the American Association of University Professors (AAUP) was established in the 1940s, and in May 1972 the Adelphi University Chapter of the AAUP was certified as the collective bargaining agent for the faculty. The first Collective Bargaining Agreement between the AAUP and the Administration was negotiated and went into effect September 1, 1973. The term of the agreement was for three years. When this first agreement expired there was a one day strike of the faculty prior to reaching an agreement which covered a two year period beginning on September 1, 1976. Subsequently the AAUP and the administration negotiated a series of three year agreements in 1978, 1981, 1984, 1987 and 1990. Negotiations for the successor to the 1990 Agreement were rather different from those which preceded it and were conducted in October/November 1992, and led to the current Agreement, which remains in effect until August 31, 1996.

In addition to the Collective Bargaining Agreement the Adelphi Faculty has other governance documents which guarantee certain rights and protections. The Adelphi University Personnel Plan was adopted in March 1968, and in June 1968 the Constitution of the Adelphi faculty was adopted. These documents, which were ratified by both the Faculty and the Board of Trustees, represented significant improvements over the previously existing governance documents. They were developed as a result of the "Krebs Case" in which a tenured professor was threatened with dismissal on the basis of his political views. An investigation by the AAUP national office, and the possibility of a vote of censure by the AAUP national organization were significant in that they played a major role in motivating the administration to agree to the adoption of governance documents which firmly established the framework for collegial governance at Adelphi. The Personnel Plan and Faculty Constitution remained in effect until December 31, 1990, when they were superseded by the Provisions for Peer Review and the Articles of Governance, both of which were adopted according to the amendment procedures specified in their predecessor documents.

The history of faculty governance, and collective bargaining at Adelphi is strongly correlated to changes in the presidency of the university. Adelphi has had ten presidents in its one hundred year history. Adelphi moved to its current location in Garden City during the presidency of Frank Blodgett, who held the office from 1915-1937. President Blodgett was succeeded in 1937 by Paul Dawson Eddy, who remained until 1965. During the period 1965-72 there were four presidents, including two acting presidents chosen from the Board of Trustees. In 1972 Timothy Costello, who had been a deputy mayor of New York City, was named president and he held the position until 1985 when the current president, Peter Diamandopoulos was appointed.

At Adelphi our governance documents were rather brief compared to those of many other institutions. The Personnel Plan ran 16 printed pages, the Constitution of the Adelphi Faculty ran nine double spaced typed pages, and the first Collective Bargaining Agreement was 20 printed pages. An important article in the first Collective Bargaining Agreement was Article VI which dealt with the Personnel Plan and Governance Provisions. It said in part:

A. The Constitution of the faculty of Adelphi University, including the document pertaining to the University Council, shall provide continuance of existing rights, privileges, and responsibilities of the faculty to participate directly through the Senate in its own governance and in the initiation of the decisions on educational policy and standards within the University.

B. The Personnel Plan of Adelphi University, including all appendices thereto, shall provide continuance of existing policies and procedures on faculty status, in all conditions and rights of appointment, reappointment, tenure, promotion, retirement, obligations and hearings.

C. Amendments to the Constitution and the Personnel Plan shall be made through existing procedures. Amendments affecting terms and conditions of employment require the concurrence of the AAUP and the Administration. However, some provisions of these documents affecting terms and conditions of employment may also be modified as specified elsewhere in this Agreement.

This language firmly established the tradition at Adelphi that faculty rights and responsibilities in self governance, academic, and personnel matters would be via the collegial documents, i.e. the Personnel Plan and the Faculty Constitution. The Collective Bargaining Agreement incorporated protection of academic freedom by the following language which appeared in Article VII, Guarantee of Rights:

B. The administration and AAUP support the principle of academic freedom as set forth in the Statement on

Academic Freedom and Tenure formulated jointly by the Association of American Colleges and the American Association of University Professors and adopted January 10, 1941 and incorporated in Appendix A of the Adelphi University Personnel Plan.

Article VII also included a past practices clause:

C. All well-established, generally applicable practices which benefit members of the bargaining unit in a significant manner shall be maintained, unless modified by this Agreement or by mutual consent. "Generally applicable" as used herein means a practice which has been applied to a well-defined category of faculty members or to a reasonable broad group of faculty members from different departments who share a community of interest. It is understood that this clause does not apply to the size and scheduling of classes, nor does it apply to workload.

Article VIII, Grievance and Arbitration, contained the following language:

F. Notwithstanding anything to the contrary contained herein, the following matters, which are governed by existing practices and statutes (e.g. Personnel Plan, Faculty Constitution), shall not be subject to the forgoing grievance and arbitration procedures: disputes relating to termination or suspension of a tenured faculty member or of a non-tenured faculty member during the period of a contract, appointment, reappointment, promotion, academic freedom and tenure.

The question of workload, a traditional area of bargaining, was dealt with in Article XVI hence its exclusion in Article VII, section C.

The Personnel Plan, the Faculty Constitution, and the 1973 Collective Bargaining Agreement established the basic framework for faculty administration relationships. In the 1976 bargaining an asterisk was added at the end of sections A and B of Article VI. The added language was,

Disputes over the interpretation, application or alleged violation of these paragraphs shall be subject to arbitration pursuant to the grievance and arbitration provisions of this contract.

This language was understood by the faculty to provide redress in terms of procedural violations of the Personnel Plan and/or Faculty Constitution.

The 1976 Collective Bargaining Agreement was not significantly longer than its predecessor; it ran 23 pages. The 1976 Agreement also established a pattern for salary increases based on the cost of living, using as an index the Consumer Price Index for the New York-Northeastern New Jersey Region. There was both a minimum floor (4 percent) and a maximum cap (8 percent). The Agreement also continued the concept of salary equalization, a procedure based on a time in rank regression analysis. The purpose of the equalization fund was to remedy disparities between faculty teaching in different disciplines. The administration, although it agreed to the concept of equalization, did not agree to an amount of funding necessary to accomplish it to a really significant degree, although in some cases equalization increments were significant for individual faculty members.

Although in subsequent bargaining years the AAUP made many proposals for improvements in the Collective Bargaining Agreement little progress was made, and the 1978, 1981 and 1984 contracts essentially followed the pattern established in 1976. Improvements in contract language were marginal. Salary increases were based on the cost of living with floor and cap model established in 1978, even though the high inflation of the late 1970s cast doubt on this model as a method of increasing the faculty's standard of living. The upside risk that the faculty would fall behind the cost of living seemed large compared to the possibility that they would do better than the cost of living. Equalization funding continued in each of these contracts but the level of funding remained insufficient to truly accomplish the desired goal.

In all the negotiations from 1976-84 there were three points of note. First, in each case the administration team was lead by the vice president for finance. Secondly, bargaining sessions were conducted by the two teams in the absence of their attorneys, with the lawyers being present at the final negotiating sessions for the review of language. Finally, the administration team rarely had any proposals of its own to put on the table. Bargaining was conducted based on a fully developed and integrated proposal prepared by the AAUP. In the area of contract language the administration usually did not come forward with any significant proposals, and bargaining basically involved trying to convince the administration of the wisdom of the language being put forward by the faculty, as well as the amount of salary increases.

In the 1978 Agreement an early retirement plan was established providing for continuation of medical and term life insurance benefits until normal retirement age. In the 1981 Agreement the plan was improved and expanded to include cash payments over a defined period of time. During the life of the 1981 Agreement the early retirement benefit was significantly improved on a temporary basis and provided a package sufficiently attractive to induce a large number of faculty to opt for early retirement.

In discussions about salaries and benefits both parties were cognizant of the reality that Adelphi is a tuition dependent university with a small endowment. A concern by the faculty for the ongoing viability of the institution led to less forceful demands in these areas than might otherwise have been the case. There

were some minor gains in the areas of fringe benefits, most notably in university contributions to the retirement plan, and salary increases at best kept pace with the cost of living index.

In the 1984 bargaining there was a major effort to improve the status of part-time faculty members, who were included in the bargaining unit in the original NLRB unit determination. This effort did lead to the inclusion of much language related to part-time faculty. A somewhat more interesting development involved language relating to merit stipends. In the first Collective Bargaining Agreement there was language which stated:

> It is understood that the administration has reserved the right to pay merit stipends, it being further understood that such stipends shall not become part of the recipients' base salary.

Although there were minor modifications in the merit stipend language in subsequent contracts, the essential feature of a stipend to be determined and awarded solely at the discretion of the administration remained. In 1984 there was a major push by the AAUP to change the language relating to merit stipends. The essential features of the new language were:

1) An individual could apply or be nominated for a stipend.

2) The application would be reviewed by a committee of three faculty members elected according to procedures established by the Faculty Senate, and three administrators chosen by the Provost.

3) The Provost had the right to evaluate the committee recommendations.

4) The amount of the stipend was specified to be $1000; the stipend would not be added to base salary; and there would be no more than five stipends in any academic year.

It should be pointed out that the inclusion of language relating to merit stipends had been a controversial matter. The language of the 1984 Collective Bargaining Agreement must be considered in terms of the language which existed previously. Prior to 1984 the administration had complete discretion as to the basis upon which to award a merit stipend and the amount of such awards. Although it was true that the administration had not, with an exception involving the entire faculty of the School of Business, exercised its prerogatives in awarding merit stipends, the possibility for utilization of the pre-1984 language as a method of either seducing or intimidating individual faculty was a very real one.

I believe that it is necessary to obtain the strongest possible language in a collective bargaining agreement when dealing with people who are reasonable about the type of relationships which collective bargaining can establish. In this respect, it is fair to say that President Costello, coming with his background in

New York City politics, recognized that collective bargaining is a legitimate mode for establishing relationships between people. While he might have preferred to function in an environment in which the faculty had not organized collectively he recognized the right of the faculty to organize and respected that right. Bargaining during his administration was difficult, and the gains made by the faculty were often minimal, but to the best of my recollection he and his administration never raised Yeshiva as a serious threat during negotiations in either 1981 or 1984.

President Costello's final year in office was one of great conflict between the faculty and the administration since the administration had rejected seven recommendations for tenure made by the University Personnel Committee. In this regard however, it should be noted that it was not the dispute between the faculty and the administration which forced the president from office. It had previously been announced that the president would step down at the end of the 1984-85 academic year.

The search for a new president was conducted by a committee made up of faculty, administrators and trustees. The committee decided early on that the search would be conducted in as much secrecy as could be maintained, and indeed there was very little discussion of the progress of the search. Members of the faculty leadership were not given the opportunity to meet with or comment on the finalists. The name of the new president became known only after his appointment. Peter Diamandopoulos, who had been forced out of the presidency at California State University at Sonoma, had been named the tenth president of Adelphi. During his time at Sonoma, President Diamandopoulos had fired tenured faculty members and as a result had provoked an investigation by Committee A of the AAUP national organization which resulted in the censuring of the Sonoma administration. During the course of the investigation President Diamandopoulos showed great disdain, perhaps contempt would be a more appropriate characterization, for the concept of collective bargaining in academia in general, and for the AAUP in particular. President Diamandopoulos' tenure at Sonoma was also characterized by extreme instability in administrative ranks as well as many allegations of improprieties. The consequence of all this was that the Chancellor and Board of Regents of the California State University System removed him from the presidency. It remains a mystery to many of us at Adelphi as to why a man with such a record was chosen to be our president. Perhaps the explanation was that, despite the moderate position taken by the faculty in collective bargaining negotiations during the period 1973-85, and despite the fact that collective bargaining had, over that period, proven itself as a viable way to establish working relationships within the university, there was sentiment on the Board of Trustees that collective bargaining should not continue at Adelphi. The 1985-86 academic year began with a new president in office and a Collective Bargaining Agreement in effect which would continue in effect until August 1987.

Although many on the faculty had grave misgivings about President Diamandopoulos, and immediately began to circulate information regarding his history at Sonoma, the new president did have support from a large number of faculty. One of the major reasons for this was the sense of many that under the

leadership of President Costello the university had lost a sense of educational direction and that a leader with an academic background was necessary to set things straight. The new president also acted quickly to have the administration and Board of Trustees reverse their previous decisions in the seven tenure cases. In his early days as president he began making pronouncements about the directions in which he wished to lead the university. He expressed reservations about the existing governance documents, but did little to try to change them in any significant way. The first opportunity to effect major changes came in the bargaining which took place in 1987.

In this bargaining a major change from the past involved the composition of the administration team. The vice president for finance was not the chief negotiator, and was not even on the team. Three of the four members of the team were deans, with the chief negotiator being the dean of an institute which had no undergraduate program. Although the administration team did not come forward with a complete proposal there were proposals in a number of very specific areas.

Most notably, the administration put forth a workload reduction proposal which one might have expected to come from the faculty. The 1987-90 Collective Bargaining Agreement had a general workload reduction which, in stages, reduced a twenty-four credit/year base workload to an eighteen credit/year base workload. While changes in some specific workload areas offset some of this, the fact remains that this was a major reduction in workload for the vast majority of the faculty. It is, I believe, useful to speculate on why the administration put forth such a generous workload reduction. I think there are a number of reasons:

1) The president could use this to claim that he was transforming Adelphi into a research university.

2) The president could, and did, use this to claim that he was "more radical" than the faculty.

3) The president believed that the university curriculum was "incoherent;" the reduction in base workload would put such a financial strain on the university if all courses which had been offered continued to be offered that the workload reduction gave the administration an effective tool to use in applying pressure for curriculum reform.

4) In the absence of language relating to class size the administration could become more active in the cancellation of smaller classes and in the elimination of multiple sections thus resulting in more "giant" classes.

In the area of salary the AAUP had decided to depart from its previous floor/cap strategy and try to negotiate specific percentage increases for each of the three years of the contract. While this did not eliminate risk, it seemed to us that it would improve the chance that we would make financial gains. The final

negotiated settlement resulted in increases of 8 percent, 7 percent and 6 percent, for an overall compounded increase of 22.5 percent. This in fact did outpace inflation for the period 1987-90. The administration flatly refused to consider the continuation of any process of salary equalization. Perhaps the most interesting discussions took place in the area of merit increases. In the final contract the merit increases were increases in base pay rather than one time stipends. The amount of the increases were variable, with the minimum increase being $1000 and the maximum being $3500); the amount of money allocated was significant ($50,000/$75,000/$75,000 for the three years of the contract); the provost, after his review of the committee recommendations determined the amount of the individual awards (subject to the specified minima and maxima). [The provost, in fact, subsequently rejected some committee recommendations (some of which had been 6-0 in favor of an award) but otherwise distributed the merit awards in equal amounts to the faculty he approved.] For me the most striking remark of the entire negotiating process took place in the final night of bargaining when the mediator informed our team that, "there would be more money available across the board if we allowed more money to be available for merit increases." It was in this context that the numbers cited above were agreed to.

Another extremely contentious area of bargaining in 1987 involved retirement. It was clear that the provision that faculty could be forced to retire at age 70 would lapse and the AAUP attempted mightily, but without success, to convince the administration to cease forcing faculty to retire at age 70. The administration also steadfastly refused to continue to include a specified early retirement plan (now renamed repurchase of tenure) but insisted that with respect to repurchase of tenure, "The terms will be those mutually agreed upon by the faculty [member] and the provost."

A final highly contentious matter was the relationship of the Personnel Plan and Faculty Constitution to the Collective Bargaining Agreement. The faculty considered these documents, which predated the first contract to have both a life of their own and to be fully protected under the Collective Bargaining Agreement. The administration wanted all reference to these documents removed from the Agreement. The resolution to this was a Letter of Understanding which was appended to the Agreement and which stated:

> The Constitution of the faculty and the Personnel Plan (including all appendices thereto) shall not be unilaterally abrogated in whole or in part, but may be amended pursuant to the provisions set forth therefore in the Constitution and Personnel Plan.
>
> This letter shall replace Article VI of the 1984-87 Agreement and all its terms, promises and prohibitions.
>
> An alleged abrogation was arbitrable before a named arbitrator.

The 1987 Agreement had in it something for both parties. For the faculty there were significant workload reductions and salary increases and for the

administration there were significant increases in the amount of control. Although the faculty had many misgivings about the 1987 Agreement it was a contract most could live with very comfortably. In its general form it closely resembled the contracts which had preceded it, and it did not foreshadow the dramatic changes which would take place in 1990.

The 1990 bargaining, in which I played no part whatsoever since I was abroad on a sabbatical, represented a real change in bargaining history. The administration team was headed by a lawyer rather than a financial or academic officer of the administration. The administration also put forth a fully detailed proposal which, although never generally circulated, is known to have contained provisions which would have given it extraordinary control over the lives of faculty. The AAUP found itself, for the first time, working vigorously to fight off extensive proposals by the administration. Although largely successful in this effort the AAUP lost ground in a number of vital areas. Although the changes in contract language are far to extensive to detail here it must be mentioned that the AAUP lost the "past practices clause" and the administration gained both a "management rights" clause and an article dealing with "Disciplinary Action."

During the period 1987-90 the president increasingly criticized the Personnel Plan and the Faculty Constitution. In 1990 the administration demanded, not only bargaining in the traditional areas covered by the Collective Bargaining Agreement, but also a wholesale revision of both the Personnel Plan and the Faculty Constitution. The AAUP had steadfastly refused to negotiate the language of these documents since it viewed them as "belonging" to the entire faculty and not only those faculty covered under the NLRB certification. Prior to the 1990 bargaining the administration went to the faculty senate and obtained agreement for the establishment of a separate committee to "work out with the administration" language to replace the Personnel Plan. Subsequently an additional independent committee was established to rewrite the Faculty Constitution. The resulting replacement documents are known as the Provisions for Peer Review and the *Articles of Governance*. A major issue during the discussions leading to the adoption of the new documents related to the process by which tenure is granted, and in particular what would happen if a recommendation of the university-wide faculty tenure/promotion committee (FCRTP) was not supported by the administration. This issue was resolved by agreement that an additional committee made up of both internal and external experts would render an opinion on the tenure case. It was asserted that no administration could retain credibility if it consistently ignored the recommendations of such committees.

The new Provisions for Peer Review and Articles of Governance were clearly given a life of their own should there be no collective bargaining agreement in force. Both documents contain the language such as (extract from the Provisions for Peer Review):

> Should this document on Peer Review be separated from the Collective Bargaining Agreement, or should there no longer be a

Collective Bargaining Agreement, procedures to amend this document shall be jointly established by the President and the Faculty Senate.

In a letter dated February 14, 1991 to Professor Stanley Windwer, who chaired the faculty team which worked on the language of the Provisions for Peer Review, the president wrote, "Should no new Agreement follow upon the expiration of the present Agreement, the new Provisions for Peer Review will remain in force."

The discussions in 1990 extended beyond the August 31 expiration date of the 1987-90 Collective Bargaining Agreement, but the Fall 1990 semester began and proceeded as scheduled in the absence of a signed contract. Agreements were reached on language for all three documents during the course of Fall Semester and they were ratified by the appropriate bodies. The president was quick to extol the virtues of these new documents and their superiority over those which existed previously. The faculty was relieved to have a very difficult negotiation settled, and took a wait and see approach to the future.

One interesting sidelight to the 1990 bargaining was that neither side was interested in the continuation of the merit award system which had been instituted in 1987. The faculty had seen the system abused by the administration, and the administration did not feel it had adequate control.

On September 24, 1992 President Diamandopoulos proposed to the faculty (not to the union) that negotiations for a new contract begin immediately and be concluded by November 15. He further went on to indicate that the scope of bargaining should be limited to salaries only, and that if such was not done he could:

> "As I have been urged again and again by the Board of Trustees and other influential educators, we can put an end to collective bargaining. After all, these distinguished educational leaders argue, Adelphi has outgrown such distracting exercises. We no longer need collective bargaining."

Clearly the president was raising a Yeshiva threat. The AAUP, after extensive discussions decided to negotiate on salaries only, and an acceptable resolution which included modest salary increases was reached. These negotiations also resulted, for the first time, in the establishment of minimum salaries for each of the academic ranks. It is important to remember that in September 1992 the 1990 Collective Bargaining Agreement and its associated new governance documents had only been in effect for less than 18 months, so people were still very much in a wait and see mode.

Over the past three years, however the situation at Adelphi has worsened dramatically. Enrollments have dropped significantly, and the size of the full-time faculty, which was greater than 400 in the early 1980s has dropped to about 250. Course offerings have been cut back and course schedules have become less attractive for students. A multimillion dollar centennial fund raising drive which

the president has repeatedly (including on September 22, 1992) stated will be announced, has never materialized. The president has been increasingly disdainful of the Provisions for Peer Review and has, with only one exception, ignored recommendations from the review committees called for under the Provisions for Peer Review. Of the seven positive tenure recommendations made by the FCRTP in 1994-95 the provost rejected six, and the president rejected the one supported by the provost. These cases are still in process so I cannot discuss them in detail here.

Other abuses and extravagances by Adelphi administrators have been reported in the press and are currently under investigations by state authorities. It is in this climate that the administration, which is now using its third labor law firm, directed its new attorneys to inform the AAUP on November 29, 1995 that it was going to file a unit clarification petition with the NLRB to decertify the AAUP as the bargaining unit for Adelphi faculty. The AAUP successfully challenged the administration's first filing of its unit clarification petition as being premature, but we fully expect that the administration will refile that petition. So at Adelphi we are truly back to basics. We see that the Yeshiva decision, which did not correctly distinguish between the professional versus managerial responsibilities of faculty has created a playing field in which the true management, namely the administration, can expend untold resources in an attempt to destroy a bargaining unit which has an established, responsible bargaining history extending over more than twenty years. What our management fails to realize is that win or lose in the unit clarification proceeding it will still have the same faculty to deal with. The unit clarification proceeding will certainly not be complete when our contract expires in August. Perhaps the administration will not be willing to bargain, perhaps they will attempt to provoke a strike. They will certainly try to intimidate and threaten individual faculty to bend to their will. The basic to which we must return is that collective bargaining is one important mode by which workers are entitled to resolve conflicts with employers. That mode should not be denied to employees. The collective strength of employees working in concert should be enough to enable legitimate conflict resolution to take place, but when a decision such as Yeshiva makes the employer/employee relationship so unequal we must work even harder to make that collective voice heard.

FACULTY COLLECTIVE BARGAINING AT PRIVATE INSTITUTIONS

C. A GENUINE SYSTEM OF COLLEGIALITY WOULD TEND TO CONFOUND US

George Sutton, University Counsel
Long Island University

Before I begin exploring the relationship between the Yeshiva decision and collective bargaining, several ground rules and assumptions must be set forth:

First, although I am currently employed at Long Island University, the views which I express here today are not necessarily the policy or practice of the University.

Second, my remarks are grounded on the assumption that the college or university to which I refer has been engaged in faculty collective bargaining for a considerable length of time. That is, my remarks are not necessarily applicable to a situation in which a faculty collective bargaining unit currently is being formed.

While certain inferences may be drawn from my remarks, I am not expressly taking or espousing a position, regarding the viability of the relationship between collective bargaining and collegiality *per se*.

My remarks focus on the potential impact of the Yeshiva decision on the collective bargaining process. Simply put -- does, and should, the potential for unit decertification be a factor in the faculty collective bargaining process.

The title for my presentation, "A Genuine System of Collegiality Would Tend to Confound Us," is not a restatement of a neanderthal higher education managerial philosophy, rather, it is lifted from a footnote in the United States Supreme Court decision in the N.L.R.B. v. Yeshiva University case. Actually, the quote comes from an NLRB decision, circa 1972, regarding Adelphi University. In that decision the N.L.R.B. found that, "a genuine system of collegiality" did not exist at Adelphi because "ultimate authority" was vested in the board of trustees at Adelphi. It is fair to state that the Supreme Court, in Yeshiva, referred to the NLRB's decision in the Adelphi case in a somewhat derisive manner. I should

note, parenthetically, that I do not intend to single out Adelphi in particular. In fact, the same footnote refers also to the NLRB's rendering questionable decisions in cases involving both C.W. Post College and Fordham University. The important point is that it is axiomatic that all private colleges and universities, at least in New York State, are corporations. All are incorporated pursuant to the Education Law of the State of New York, and, as such, as a matter of law, the board of trustees of each must be the final authority on all matters of significance. Much of this authority is non-delegable. On the other hand, a board of trustees may consistently accept recommendations and advice from certain institutional entities or functionaries. Thus, there was a certain inherent wrongheadedness in the NLRB's approach in its evaluation of the appropriateness of collective bargaining at Adelphi, as well as other colleges and universities. As a result, the Supreme Court found that, in many early cases, the NLRB had dealt with issues of the certification of faculty collective bargaining units in a less than consistent and logical manner.

To a large extent, therefore, we are here today because of the initial failure of the NLRB to deal properly with issues of faculty collective bargaining in higher education. In all fairness to the NLRB, however, it should be noted that in the early 1970s, the NLRB found itself in the new and uncharted waters of faculty collective bargaining in a predominantly collegially governed environment about which apparently it had little understanding. This explains my choice of the title, "A Genuine System of Collegiality Would Tend to Confound Us," because I believe the NLRB would have been thoroughly paralyzed had it realized that it was not able to recognize a collegial system when it saw one. Possibly, paralyzation would have been the preferred alternative. As a result, nevertheless, in the early and mid 1970's it is likely that the NLRB certified improperly a fair number of faculty collective bargaining units. That is, the NLRB found units where it should not have found them. At the same time, many college and university administrations probably voluntarily recognized faculty collective bargaining units when they were not required legally to do so. This would have been particularly the case had the college or university looked to NLRB case law for guidance when deciding whether or not such voluntary recognition was appropriate or warranted.

Once a faculty collective bargaining unit was improperly or inappropriately certified by the NLRB, or mistakenly voluntarily recognized by a college or university, for that college or university, the advent of the Yeshiva decision, in 1980, had no impact per se. For such colleges and universities, the Yeshiva decision is effective only when it is used as a defensive weapon by the management of the college or university to deflect a claim filed with the NLRB, by the union, in which the union alleges that, management has refused to bargain in good faith with the union, or has otherwise engaged in an unfair labor practice. Certainly, at the end of a contract period, the management of such college or university could also institute a unit clarification before the NLRB.

The question here today, therefore, is under what circumstances will the management of a college or university probably use the Yeshiva "card" in the collective bargaining process.

First, one must take a look at the manner in which the faculty collective bargaining agreements already in place at many colleges and universities, deal with the Yeshiva defense. The faculty collective bargaining agreements at many colleges and universities contain provisions which explicitly prohibit the management of that college or university from raising a Yeshiva claim during the term of the particular collective agreement. Naturally, when the collective bargaining agreement expires, all bets are off and the Yeshiva war may be on. Other collective bargaining agreements may use a more subtle approach. I know of at least one agreement that does not expressly preclude use of the Yeshiva defense to decertify the unit, rather, the agreement limits all means and forums of dispute resolution to those within the agreement itself and, in fact, incorporates into the agreement all of the terms of the National Labor Relations Act. Presumably, incorporation of the Act preserves the rights of both parties to rely on the protection of the Act without resort to a hearing before the NLRB. All such rights under this agreement must be enforced by means of private arbitration. Surely, any collective bargaining agreement which expressly or even obliquely refers to the Yeshiva defense virtually contemplates that Yeshiva will be a subject of the collective bargaining between the parties. In other situations, faculty collective bargaining agreements are silent regarding the matter.

The question becomes, then, when and under what circumstances will Yeshiva be a significant factor in faculty collective bargaining?

In certain situations, the Yeshiva impact may be significant, yet unspoken, and unacknowledged. This form of impact is probably greatest from the union's point of view. A majority of faculty unions probably believe that they would be able to deflect a Yeshiva-based attack if they are brought before the NLRB. It is likely that many faculty unions believe that the management of their college or university retains sufficient authority and control to enable the union to undercut a Yeshiva defense. Such unions still may be affected by Yeshiva because these unions will be careful and will formulate their bargaining positions and proposals in a manner which preserves its shield against the Yeshiva defense. For example, such a union will usually refrain from making, or insisting on, bargaining proposals which could be perceived as making the faculty represented by the union more "managerial." It is unlikely, therefore, that such a union would make any proposals which would limit or undermine the authority of its board of trustees or other senior administrators. Thus, Yeshiva quietly hangs over this union's bargaining -- mostly silent, but significant.

Management, on the other hand, may decide that it is in its interest to play the Yeshiva card prior to or during the course of the bargaining. Management, therefore, may decide to make Yeshiva a significant issue during the bargaining. Basically, there are two circumstances when management may choose to take this extreme action. Those circumstances are when, 1. management believes that the governance structure of the college or university is threatened by the existence of the faculty collective bargaining unit, or 2. under certain severe economic circumstances when the faculty union is viewed by management as being "difficult."

Earlier, I noted that invoking the Yeshiva defense is considered an "extreme action." I use this phrase advisedly, however, quite seriously. I assume that everyone understands the implications of such action. It places the union in a position in which it is fighting for its very life and existence. From the point of view of the members of the bargaining unit, a strike vote, under these circumstances, is a vote for or against collective bargaining. It may affect faculty and others on a personal, economic or even an ideological level. When a college or university management employs the Yeshiva defense, other non-faculty unions are more likely than not to respect faculty picket lines and support the faculty's strike. Notwithstanding the validity of management's position in asserting the Yeshiva defense, the political community will find it difficult to support the college or university's management and risk voter dissatisfaction, etc. Assertion of the Yeshiva defense is a serious matter indeed for all concerned.

Management, therefore, will be reluctant to assert the Yeshiva defense unless it too believes that its survival is at stake. In many circumstances, college and university management views an attack on, or an undermining of the basic governance structure, as an attack on management itself. Given the expense and the distractions caused by assertion of the Yeshiva defense, not even considering the possibility of serious job action by the union, most college and university management will not embark upon the Yeshiva adventure unless it feels compelled to do so. Recalling that many faculty collective bargaining units which are twenty years or so old may have been improperly certified, management affected by these decisions may have had an uneasy tolerance of the existence of the bargaining unit for all that time. In most cases, this uneasy tolerance of the existence of the bargaining unit probably will persist unless the relationship between collegiality, governance and management interests are somehow thrown out of balance. If the disturbing or imbalancing factor happens to be the faculty union, then the Yeshiva defense is likely to follow. This will be the case particularly in a situation in which the governance and collegial systems were recently, at least within management's memory, in a mature and well-developed state. If management perceives that the faculty union is somehow destroying a long-term, well-developed, shared governance system, the downside effects of the Yeshiva defense are minimized, or rendered irrelevant.

There is, however, yet another factor to be considered. That consideration is the highly competitive environment in which many private higher education institutions are now forced to operate. Governmental reductions in student financial aid have caused institutions to supplement such aid loses with institutional funds or "discounts." Whatever the terminology, funding or discounting, the result is severe economic pressure on the institution. In addition, there is price competition between institutions. It is a given in private higher education, that costs of personnel are the major expenditure in most institutional budgets. In some circumstances, it will be more difficult for an institution with a unionized faculty to adjust faculty personnel costs to be consistent with the institution's financial position, than would be the case if the institution's faculty are not unionized.

On the other hand, there may be circumstances in which certain economic defensive strategies can be employed only in situations in which collective bargaining is the norm. Ironically, some economic strategies are available only in cases in which there is a collective bargaining agent present to facilitate the economic program without destroying faculty morale.

Overall, from a management point of view, it is probably true that the Yeshiva defense is not particularly desirable for use in dealing with an economically uncooperative faculty union. Rather, a good old fashioned economic strike is usually management's superior weapon of choice. Simply put -- if management is prepared to deal with an economic strike, it is likely to prevail ultimately in such a dispute. Should it become necessary, management is still able to replace permanently faculty who participate in an economic strike.

That management is not likely to use the Yeshiva defense for purely economic reasons, is as it should be. The Yeshiva defense was put forth by the United States Supreme Court to provide a means for some colleges and universities to correct an injustice suffered by them during the early 1970s -- an injustice which was wrought upon them by the NLRB, or was self-imposed by following the NLRB's incorrect lead. It was not intended to be simply just another weapon at management's disposal for use in faculty collective bargaining. Although it is certainly lawful and proper to use it for such a purpose.

I will close by reminding all that, while management may get the union it deserves, the union may get Yeshiva when it deserves.

V. EMPLOYEE ISSUES

A. **Staff Collective Bargaining in the California State University: Ending the Cycle of Non-Stop Bargaining**

B. **Staff Bargaining in Higher Education**

C. **Participation in Decision-Making in Higher Education: Oxymoron or Opportunity**

EMPLOYEE ISSUES

A. STAFF COLLECTIVE BARGAINING IN THE CALIFORNIA STATE UNIVERSITY: ENDING THE CYCLE OF NON-STOP BARGAINING

Samuel A. Strafaci, Senior Director
Employee Relations, California State University System

Collective bargaining in The California State University's twenty-two campus system has undergone a dramatic change in the last several years. Until the early 1990's, staff (as well as faculty) negotiations on economic matters were predictable. Both parties were generally unwilling to make commitments on salary and benefit increases until the system's fiscal year state budget funding increases could be reasonably contemplated. As a consequence, meaningful negotiations on economic matters did not begin until after the passage of the state budget, and negotiations would often drag on well past the beginning of the fiscal year, especially in cases in which there were other unresolved issues. Salary increases retroactive to the beginning of the fiscal year were routine, creating no incentive for reaching and early agreement.

These dynamics often resulted in perpetual year-round negotiations. Just as bargaining was concluded for the previous fiscal year, proposals were being made public for the upcoming fiscal year. In this environment, there existed no uninterrupted period of labor peace, where the parties were engaged exclusively in the administration of their collective bargaining agreement. Instead we were always negotiating with all units either the next contract, or simply economic matters for the upcoming fiscal year, often in an adversarial manner.

LAYOFF IMPACT BARGAINING

The state of never-ending bargaining, on economic reopener negotiations and full contract bargaining where appropriate, was soon compounded in the early 1990s by the state's economic recession and its inevitable effect upon our collective bargaining relationships. Beginning in fiscal year 1991/92, the CSU's budget began to experience significant reductions that lasted for several years.

We experienced large numbers of layoffs of our faculty and staff employees, resulting in both the inevitable decline in employee morale, as well as an increase in labor-management acrimony and litigation. In this environment, a new

bargaining demand raised its head: negotiations on the impact of the layoffs of large numbers of staff employees on almost all CSU campuses. Initially, we attempted to respond to these layoffs on a campus-by-campus basis in order to explore specific layoff mitigation options, further increasing the workload associated with the CSU's bargaining obligations.

BARGAINING THE DENIAL OF STEP INCREASES

As if the need to negotiate routine economic matters and the impact of layoffs were not enough, a third bargaining obligation became evident as a result of the state's funding crisis. Merit Salary Adjustments, or automatic steP increases for employees who had yet to reach the top step of their salary schedule, were no longer being funded by the state. The state's collective bargaining statute, and our agreements, contained a requirement that the parties bargain whenever an economic benefit provided in the contract was not funded by the state. The suspension of these MSA payments then resulted in an obligation for the CSU to bargain with all staff unions on the impact of the denial of this economic benefit, and whether there were some negotiated alternative to the suspension of these payments. The CSU was now deadlocked in its negotiations with all nine of its unions, including the faculty union, regarding:

1. successor contracts, where appropriate;
2. salary and benefits increases;
3. the impact of layoffs; and finally
4. a failure to provide negotiated step increases.

While the layoff impact bargaining obligation eventually disappeared with an improvement in the state's economy, these layoffs had a residual effect on the parties' relationship. The need to simultaneously respond to so many bargaining obligations provides the backdrop for the administration's desire to resolve, in its fiscal year 1995/96 negotiations, many of the issues which were contributing to the non-stop cycle of bargaining. In this fiscal year there was a small compensation pool available, and we saw the need to create incentives for settlement on economic matters early in the fiscal year. In addition, we wanted to address the lingering problem associated with the state's continued failure to fund the "merit" salary adjustment service step increases.

Additional bargaining objectives were soon placed on the CSU's agenda. Our trustees and senior executives sought to be responsive to political pressure from the state legislature and the governor to provide negotiated incentives for outstanding employee performance, both faculty and staff. Our unions had vigorously supported the governor's democratic opponent in the 1994 gubernatorial election, and our state assembly soon thereafter became majority Republican.

Bargaining in a system as large as the CSU presents several problems in defining, and gathering appropriate consensus for a consistent bargaining strategy. We sought to crystallize the CSU's bargaining objectives and strategy in an effort

to address many of the aforementioned problems, and at the same time, negotiate meaningful performance pay programs with all unions.

PROBLEMS IN ATTAINING CONSISTENT CSU BARGAINING STRATEGY

The Office of Employee Relations in the CSU is required to develop and then pursue a clear and effective bargaining strategy on behalf of an institution with 22 campuses and approximately 35,000 represented employees. In an organization as large and diverse as the California State University, where so many presidents, other key executives, and governing policymakers are required to agree upon and support such policy decisions, this effort can sometimes seem impossible to accomplish. Just as importantly, failure to proceed with appropriate policy direction and support will, at the very least, hamper any negotiation efforts.

For fiscal year 1995/96 the CSU achieved success in policy and negotiation strategy development through:

1. the establishment of smaller representative policy committees staffed by key executives;
2. speedy endorsement by requisite governing board participants;
3. following up key strategic policy decisions and recommendations with all necessary communication to all affected campus personnel.

Clear and specific communication with, and agreement of, all policy committees regarding perceived CSU objectives and strategies was pursued as early as possible. Once obtained, these goals and strategies were reviewed, and as need be modified, before finally being adopted by our governing board. Thereafter, communication to appropriate campus personnel ensured buy-in at that level.

CSU PLAN FOR EARLY CONTRACT RESOLUTION

We determined that the only meaningful incentive for reaching agreement of economic matters by the beginning of the fiscal year was for the CSU to make its economic offers contingent upon ratification by the unions by no later than the date of the beginning of the fiscal year. Of course, this required that the CSU be willing to make economic commitments in its proposals prior to the adoption of the final state budget. The CSU's proposals would then become contingent upon not just a timely agreement with the exclusive representative, but also upon a specific level of funding from the state in order to provide the salary and benefit increases. Under those circumstances we advanced our proposals well before the beginning of the new fiscal year, so that bargaining could reasonably be completed prior to July 1, 1996. The proposals to our unions read as follows:

For fiscal year 1995/96, the steps on the salary ranges of all bargaining unit classifications shall be increased by x percent effective July 1, 1995, provided that all of the following occur:

a. the combination of both the final increase in revenue resulting from an increase in the State University Fee for fiscal year 1995/96, and/or any final state budget augmentation allocated to the CSU specifically to offset such student fee increase, equals at least the equivalent of a 10 percent increase in revenue resulting from such student fee increase;

b. that the final state budget general fund appropriation and allocation to the CSU is no less han the level of the general fund appropriation to the CSU in the Governor's Budget for fiscal year 1995/96; and

c. that the parties reach final agreement on a successor contract by no later than July 15, 1995.

This strategy of conditioning the resolution of economic matters on specific budgetary allocations to the CSU, while at the same time making our economic proposals effective only upon the execution of a new contract, was effective with some, but not all, of our bargaining units. We reached a timely agreement with our faculty bargaining unit, as well as with several of our staff units, all of which included new performance pay programs. As a result, with these units, pay increases were able to become effective in July 1996. In these units our strategy served to create a meaningful incentive for the early resolution of all outstanding bargaining issues. You will find more complete summaries of the negotiated settlements in the CSU attached. They indicate that we dealt with specific issues noted above in the following manner.

MERIT SALARY ADJUSTMENTS

The agreements with all of our unions abolished the automatic Merit Salary Adjustment programs in effect and replaced them with a Service Salary Increases program that must be specifically negotiated along with all other economic matters in any fiscal year. As a consequence, the issue of whether the state has specifically funded the step increases has become moot.

We have, in fact, negotiated to provide specific service salary increase payments in fiscal year 1995/96 for several units. This became an attractive alternative for our unions to the predecessor MSA program which existed in name only because these payments had not been funded by the state, and therefore had not been provided, for several years. In making the conversion to the Service Salary Increase program, we have eliminated the requirement to bargain, as in the past, whenever the old MSA payments are suspended. We have also put behind us the litigation associated with the suspension of these payments.

CSU PERFORMANCE PAY PROGRAMS

The faculty and staff agreements all contain a pool of funds to be utilized to make awards in recognition of outstanding performance. We have raised the top step of all salary ranges in all bargaining unit classifications in order to accommodate performance step movement for employees previously at the top step.

Each agreement also guarantees that a minimum of 20 percent of future years' total compensation settlement must be dedicated to the Performance Pay Program in those years. These programs have received enthusiastic support in our state legislature and with our governor. The CSU intends to continue these programs in future collective bargaining agreements with all unions.

SUMMARY

We now have reached agreement with all but one union. All negotiated agreements deal with all of the outstanding issues in the manner described above. All negotiated agreements extend until June 30, 1998. Only one of our unions has a contract which expires before 1998. The agreement with our skilled trades unit is scheduled to be re-negotiated in the next few months.

CSU Agreement Summary
Faculty Unit
October 1995 - June 1998

Compensation

- A 1.2 percent across-the-board general salary increase.

- Elimination of automatic Merit Salary Adjustments, which are replaced by Service Salary Increases that must be specifically negotiated in any fiscal year. In fiscal year 1995/96, two negotiated Service Salary Step Increases (total of approximately 5 percent) payable on their anniversary dates, for all unit employees eligible to receive an MSA under old MSA concept. In addition a minimum one and one-half percent (1.5 percent) CSU gross general fund budget increase guarantees one Service Salary Step Increase (2.4 percent) in each of fiscal years 1996/97 and 1997/98.

- Implementation of a Performance Salary Step Increase program in academic year 1995/96 with a pool of $900,000. Performance pay decisions are subject to advisory review by a faculty panel, rather than subject to binding grievance arbitration. Requirement that minimum of 50 percent of performance pay awards shall go to nominees recommended by faculty committee. Guaranteed minimum 20 percent of future years' total compensation settlement dedicated to the performance pool.

- Implementation of 2.4 percent salary schedule with new rank elevated top steps (see attachment).

- Elimination the CPEC salary lag adjustment language.

- Elimination of Designated Market Discipline salary schedule, with transition of DMD faculty to new schedule effective July 1, 1996.

- Implementation of new market/equity salary provision.

SABBATICAL LEAVES OF ABSENCE

Elimination of language requiring the deferral of sabbatical leaves to successive academic years.

Workload

- Elimination of suspended 1 Weighted Teaching Unit direct instructional reduction commitment.

- Elimination of the 15 (12 and 3) Weighted Teaching Unit standard in Article 20.

- Implementation of more expansive instructional faculty responsibilities definition.

Layoff

Increase in the notice of layoff of tenured faculty for lack of work/funds from 120 to 180 days (6 months).

Union Rights

Increase in the release time of CFA chapter representatives from three WTUs on semester campus, and four WTUs on quarter campus to six WTUs on semester campus, and eight WTUs on quarter campus. Provide 24 WTU pool for system level CFA officers.

Grievance Procedure

- Implementation of statute of limitations on cases appealed to arbitration.
- Implementation of priority scheduling of liability cases.
- Implementation of optional advisory grievance mediation.

Non-Instructional Issues

- Removal from the bargaining unit those Head Coaches in classifications 2373, 2374 and 2375 who supervise two or more full-time faculty unit employees.
- Clarification of appointment and evaluation procedures for non-instructional unit members.
- Requirement that approximately 150 counselor unit employees receive all benefits provided in the current faculty contract, with the sole exceptions of sabbatical leaves of absence, placement on the faculty salary schedule, and FERP.

Maternity Leave of Absence

Implementation of ten days maternity leave of absence with pay for period of recovery from childbirth.

Union/Management Relations

Establishment of campus labor/management committee, to meet once/term, to discuss local matters of contract implementation and interpretation.

CSU Agreement Summary
Staff Bargaining Units
July 1995 - June 1998

Compensation

- A 1.2 percent to 1.57 percent across-the-board general salary increase, depending upon the unit.

- Elimination of automatic Merit Salary Adjustments, which are replaced by Service Salary Increases that must be specifically negotiated in any fiscal year. In addition, a minimum one and one-half percent CSU gross general fund budget increase guarantees one Service Salary Step Increase (2.4 percent) in each of fiscal years 1996/97 and 1997/98.

- Implementation of a Performance Salary Step Increase program in academic year 1995/96 with a pool of varying amount by unit. Performance pay decisions are not subject to the grievance procedure. Guaranteed minimum 20 percent of future years' total compensation settlement dedicated to the performance pool.

- Implementation of 2.4 percent salary schedule, or conversion to open salary ranges, with new rank elevated top steps.

EMPLOYEE ISSUES

B. STAFF BARGAINING IN HIGHER EDUCATION

Brenda Richardson Malone
Vice Chancellor for Faculty and Staff Relations
The City University of New York

Reflecting on the last 20 years of collective bargaining in higher education, one need not reflect long to see the continuum of change that has underscored the issues on the staff collective bargaining agenda during that period and the changing dynamics of higher education that underscore the important issues on that agenda today.

For the purpose of this discussion, my reference to "staff" includes those categories of non-academic personnel such as professional, clerical, technical, maintenance, secretarial and skilled trades -- often also referred to as white and blue collar employees. The collective bargaining agenda for such staff and its relationship to the faculty bargaining agenda will be the focus of my remarks today.

Let me start by conveying some basic information regarding staff bargaining units at our colleges and universities. The study, done by Richard Hurd with Kim Fellows during 1992-94, regarding staff bargaining agents in higher education notes that of 2,722 total campuses nationwide, 2,527 (92.8 percent) responded to the Hurd/Fellows survey. The study further points out that of that number, 881 (34.9 percent) have staff bargaining units. Representation is more likely in the Midwest, Northeast, and Pacific Coast than the remainder of the country and the public sector is more heavily unionized than the private, with 47.9 percent of the public sector campuses reporting staff unions, compared to 17.3 percent of private sector campuses.

Scanning 20 years of staff bargaining, we find that in the late 1970's and early 1980's, across-the-board increases, enhanced benefits and cost-of-living adjustments to keep pace with inflation were key elements of staff bargaining. In the mid 1980's, amidst a quelling of inflation as well as diminishing union membership and strength, flat wage increases, merit pay and cash bonuses prevailed. In the 1990's, the tides of economic change have more dramatically

resulted in a focus on longer term contracts, fewer annual across-the-board increases (thus more zero-increase years) and greater utilization of one-time lump sum increases. This trend will likely continue as we approach the late 1990's and beyond.

Having been responsible for staff bargaining both at Wayne State University and The City University of New York and having negotiated many contracts at Wayne State from the late 1970's to 1990, I observed these bargaining trends first-hand. Here at The City University of New York (CUNY), we have just commenced bargaining with the Professional Staff Congress/CUNY which represents more than 8,000 full-time teaching and non-teaching instructional staff and several thousand part-time instructional staff members. As well, we are poised to begin negotiations with non-academic staff bargaining units later this month. At CUNY, this non-academic staff group is comprised of more than 9,000 employees represented by District Council 37 (AFSCME); the International Brotherhood of Teamsters (IBT), the Service Employees International Union (SEIU), the International Union of Operating Engineers (IUOE), and the International Brotherhood of Electrical Workers (IBEW), the United Brotherhood of Carpenters and Joiners, the Civil Service Painters, and several others. Although I clearly do not know, nor can I predict, the outcome of CUNY bargaining with our staff and faculty, I do know that CUNY is in the midst of a financial crisis the likes of which it has not heretofore experienced, having declared fiscal exigency at the senior colleges both for this year (1995-96) and for next year (1996-97) on the basis of a proposed state budget reduction of $57.6 million (11.2 percent); resulting in an actual shortfall of $96.3 million once the value of salary and other non-personnel mandatory increases are factored in. This is exacerbated by the fact that CUNY is functioning in a city and state environment that is plagued by budgetary shortfalls. Since the City University is a public institution that receives funds from both the City of New York and State of New York, CUNY bargaining is significantly influenced by the contract settlements that are negotiated by both entities. The State of New York is currently negotiating a new agreement with the United University Professions (UUP), the collective bargaining agent for the instructional staff of the State University of New York (SUNY), but has recent settlements in place with its Civil Service Employees Association (CSEA) and Public Employees Federation (PEF) staff bargaining units. The contracts with those two units cover a four-year period from 1995-1999 and include similar compensation patterns which provided a zero increase in the first year of each contract, lump sum bonuses, not added to the base of $550 and $700 in the next two years and no base salary increases until the midpoints of the third year and the fourth year of the contract at 3.5 percent each time.

Similarly, New York City's recently negotiated settlements with the majority of its civil service or white and blue collar employees covered a five-year period from 1995-2000, provided no increases in the first two years and 3 percent, 3 percent and 4.75 percent base increases over the remaining three years of the contract. This settlement also included a job security provision covering the first two and one-half years of the agreement.

The features of these city and state settlements are interesting not only because they influence and set the pattern for CUNY bargaining, but also because they very much mirror the trends in collective bargaining nationwide -- trends which, as mentioned earlier, include longer term contracts, fewer across-the-board increases and more one-time lump sum bonuses. These trends suggest that in a time when slow economic growth, downsizing, restructuring and global competition abound, new strategies for survival must emerge at the bargaining table. These strategies will not only be designed to help restore an employer to sound financial health, but will also be designed to promote the survival and continued ability of the union. This will be most clearly evidenced by a more acute and continued focus on job security.

Noting then the need of employers to restore or maintain economic stability and the need of unions to maintain jobs, it is appropriate now to look at these needs within the context of the traditional differences between faculty and staff bargaining and to consider their impact, if any.

Historically, the differences between faculty and staff collective bargaining have been rooted in divergent interests and needs -- with the interests of academics being markedly different in scope and focus from their non-academic staff colleagues. For the most part, faculty at our colleges and universities have enjoyed a relatively stable academic existence -- enjoying a position of substantial power within the institution and exercising a great deal of authority over their academic lives. Faculty participation in matters pertaining to academic policy, peer review, tenure and promotion evince this power and result in substantial institutional decision-making authority vested in the faculty. Faculty interest in maintaining and strengthening this position within the institution has directed and motivated its use of collective bargaining toward that end. On the other hand, staff have not traditionally enjoyed the same base of power. As a general rule, staff have not played a role in governance having been denied any such role by the faculty or perhaps having had less of an interest in running and managing the institution and more of an interest in enjoying the rewards of the organization's success through salary increases, enhanced benefits and other conditions of employment. The perception by staff, however, of the differences in the power relationship between themselves and the faculty have, at times, caused tension. It should be noted that as funds to higher education have diminished, the interest on the part of staff bargaining units to be parties with management in charting the course of the institution has increased. It is not, however, for the reasons nobly rooted in collegial approaches to shared governance, but rather, for the purpose of ensuring greater institutional success and, thus, a greater share of the financial rewards for its members.

Despite these longstanding differences, diminished resources and financial uncertainty change the dynamics of the needs expressed by faculty and staff in negotiations and result in increasing similarities between these two groups being expressed across the table. These similarities are most notably evidenced through a common desire to protect jobs. In both faculty and staff bargaining, this job protectionism will manifest itself through specific job security language designed

to secure commitments to avoid the retrenchment or layoff of faculty and staff; longer term contracts designed to ensure stability; redeployment provisions, whereby layoffs or retrenchments are avoided by redirecting employees to other unrelated positions that they can arguably efficiently fill; early retirement programs and severance programs that reduce numbers of employees and related costs volitionally and health care cost reductions through managed care provisions. Interest in these job protectionist strategies will continue to blur the heretofore divergent interests of faculty and staff and will continue to be pushed as the tradeoff for wage increases.

In closing, suffice it to say that changing circumstances result in changing needs. Certainly, the goal of collective bargaining will not change. It will still be to reach closure on agreements that are perceived to benefit both the institution and its employees. However, changed circumstances and changed fiscal conditions produce changed outcomes. More and more, the dynamics of faculty and staff bargaining are concerned less with who gets control of the pie, but rather, with just trying to get a slice of a pie that is shrinking rapidly. The unsettled and fragile budgetary situation that exists at many colleges and universities will necessarily force a blending of the needs of faculty and staff such that the needs appropriately raised during collective bargaining will more likely than ever resemble each other out of economic necessity and basic survival.

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EMPLOYEE ISSUES

C. PARTICIPATION IN DECISION-MAKING IN HIGHER EDUCATION: OXYMORON OR OPPORTUNITY?

Walter J. Gershenfeld, President
Industrial Relations Research Association

Participation in decision-making in higher education carries both internal (collegiate) and external (non-collegiate) baggage. Internally, private college and university professors are subject to the Yeshiva decision.[1] The National Labor Relations Board (NLRB) in a decision that was ill-advised in the opinion of many observers, including myself, ruled that Yeshiva's faculty members were not employees, but members of management since they participated in such decisions as hiring, tenure and promotion. The analysis failed to recognize that faculty members are also employees and do not have similar input with regard to many aspects of compensation and working conditions. Curiously, Yeshiva has not been emulated on a wide scale in the public sector where faculty activity regarding hiring, tenure and promotion are similar to the private sector.

Externally, the Electromation decision has a potential impact on participation in higher education decision-making.[2] There, the NLRB held that an employer's establishment of employee advisory groups when a union was present amounted to the creation of a company-dominated union and was, therefore, illegal under the Labor-Management Relations Act. The decision has aroused considerable controversy and been hailed because it presumably stops employers from engaging in union-avoidance practices as well as attacked for making employee quality- and production-advisory input difficult in a competitive world. Curiously, where a faculty union is recognized at a private college or university, or if Yeshiva is overturned, given college and university financial and other support for faculty senates, the support is probably illegal under Electromation.

Thus, we begin with the fact that involvement in decision-making, particularly for faculty in private colleges and universities, operates in an environment which is confusing and may place limitations on certain types of faculty input in higher education decision-making. I will proceed on the assumption that the desirability of substantial employee involvement in organizations is clear, and systems can be designed to facilitate such participation which do not interfere with union organizational rights.

However, for certain purposes, we must recognize that higher education differs from most other types of organizations. Many consultative entities are in place, but, as will be discussed below, they may not always be the best instruments for participation. Academia is also noteworthy for some contrary-to-logic roles for its participants.

Examples abound. We theoretically honor teaching, but usually the most distinguished faculty members are those whose ability to obtain grants permits them to decrease or eliminate any teaching responsibility. Faculty jest about students, with some accuracy, that they are the only consumers who pay in advance for a product and frequently refuse delivery. In a curious role reversal (co-option) faculty routinely deny tenure to individuals who would have received tenure a few years ago. Faculty are thus doing a weeding job for administration which permits hiring of new professors at lower salaries and avoids the possibility of a newly tenured faculty member electing to become less productive. Administration and trustees alike have supported expansion of law schools. Marginal cost for law school growth is low. However, we have created unsatisfactory class sizes and are turning out more lawyers than the economy can handle. In any event, participation in academia takes place in a complex environment.

I will begin with faculty involvement in decision-making, but I will also cover potential participative roles for staff, students and administration. Interrelationships among administration, faculty, staff and student groups will be highlighted. Finally, I will offer ten principles of participation suitable for groups seeking to build or improve an input system at a college or university.

FACULTY INVOLVEMENT IN DECISION-MAKING

Let us assume both a faculty bargaining unit and a faculty senate are present. The question then becomes: What type of participation is possible since the senate handles personnel actions and the bargaining agent deals with bread-and-butter issues? Well, just as in non-academic participative groups, there are key issues involving cost saving and quality appropriate for academia. Although other issues exist such as safety, I will concentrate on cost and quality as illustrative of participation roles for faculty.

I note that the participative mechanisms which will be established must accommodate the joint interests of the bargaining agent and senate, as well as school and departmental groups, if the participative system is to be successful. However, so long as a bargaining agent is present, the lead group for participation initiatives must be the bargaining agent, and the work must take place largely under its aegis. Again, there is room for additional participative activity by all concerned, and a healthy system will make the necessary accommodations. For example, existing committees may be appropriate for moving a given subject forward, and the participative groups might serve as agenda builders for these committees.

Some caveats. Individual personnel situations are not the province of a joint, participative committee. The salary or performance of the president or the football coach do not belong in the participative setting. Nor should matters which impact the faculty indirectly go on the participative committee's menu alone, for example, library and security. Clearly, such areas require the involvement of more than one group. I will later discuss the concentric circle approach to multi-group issues. However, where faculty are directly affected, even though another group is involved, the faculty participative group should be able to deal with the matter. An illustration would be the use of laboratory assistants. Liaison with the staff group remains important. Part of liaison with other groups is the need for all concerned to keep interim results confidential. Tentative conclusions subject to change should not be common currency.

One important issue which will arise is a central group's ability to handle parochial questions. Illustratively, the American Association of Collegiate Schools of Business (AACSB) mandates areas of knowledge required if an organization is to receive accreditation for its business programs. The areas of knowledge were meant to be included in core courses with perhaps two or three such areas covered in a single course. Over time, however, the interests of discrete business school departments led them to establish full courses for their specialties. One of the weaknesses of many business programs today is the lack of flexibility for students because of too many required full courses. Business school curriculum committees have often hesitated to address the matter for political reasons. The AACSB itself has indicated that it would like to do something about the problem. The suggestion that we move forward on this matter coming from a joint participative committee may permit action in what heretofore has been too difficult a problem to address directly. If change is achieved, the flexibility acquired may be cost positive by attracting more students to the program. The program may be qualitatively improved because of proper time frames for program segments.

Another illustration. As technology impacts the workplace, more and more schools are looking into a growth role for distant learning. Senates and unions will have legitimate interests in distant learning, but a college or university-wide participative group dealing with the subject on neither an adversarial nor a purely academic basis will have an opportunity to move the activity forward on its own as well as assist in identifying the components best handled directly by a senate or a union.

A problem for all institutions is the tenured professor who is not performing well. A participative joint committee can help improve the quality of the educational product by developing cooperative mechanisms to assist these professors as a group. Remember, the participative committee does not deal with individual cases. Obviously a considerable amount of liaison will be necessary with affected departments and schools, but clarification as to how to handle filling the need is the important potential contribution of the joint committee.

Illustrations such as those listed above make it clear that there will likely be overlap among functions between new participative committees and existing

entities. It must be remembered that much of the same problem exists in connection with private sector participation efforts. There are established organizational departments in private industry which are identified with professional services. For example, a quality control department in a manufacturing firm has an obvious interest in quality improvement. This does not mean there is no room for a joint quality committee. Nor does it prevent the department from playing a useful advisory role to a participative group addressing quality, and it does not limit them to an unquestioning acceptance of the product of the participative group. The bottom line is the participative groups can work within the system as well as create new and possibly more open vehicles for organizational improvement.

I note that faculty bargaining units and faculty senates have learned how to deal with problems of overlapping jurisdiction. One not uncommon solution is for a senate to act, in effect, as the hearing officer for such issues as tenure and promotion problems. The bargaining agent then becomes the effectuating device if a case appears to be sound for further faculty action.

When we have a faculty senate, or like mechanism, and no bargaining agent is present, the principal difference is that only the campus-wide committees are likely to be the province of the senate. The college councils and departmental committees in a given school or college will also be the instrumentalities which may become involved in new participative activity. This presents some difficulty since the existing committees may be part of the problem. However, a faculty senate can create suggested ground rules for effective participation to be used when it becomes clear that the existing system is not suitable for effective participation. Considerable internal structural bargaining may be necessary under these circumstances.

The new participative system will probably require the services of a facilitator. These are individuals who are skilled in establishing these systems and can anticipate and deal with the points of difficulty which will arise. For example, almost every one of these plans has an early occurrence or two where one component wishes to terminate the activity. This is normal and facilitators are skilled in interest-based approaches which address both the real needs of the parties as well as identify acceptable solutions.

All of the above may lead some observers to question the potential worth of new participative efforts. It is easy to sign off noting the existence and mandate of present instrumentalities. These committees or task forces may hopefully be stimulated to re-examine their activity. However, many of the areas to be covered are over-arching and cannot be easily handled by a variety of parochial instrumentalities. Most important, participative groups may create outcomes not easily available from present groups. The nature of the participative system will have to reflect the history and ethos of different colleges and universities. The evidence, based on success in other milieus, is that new approaches can work, and the tools of the past may not be sufficient to deal with the emerging problems of today's colleges and universities.

STAFF PARTICIPATION

In the event staff members are organized, their union(s) become the basis for establishing a participative program. Most of the caveats discussed above for faculty apply to staff groups.

Some past attempts to align faculty with staff have been unrealistic. It does not make sense for both groups to be present when matters are to be discussed which affect only faculty or staff in a meaningful way. For example, staff members are likely to have little interest in the percentage of arts and sciences courses required for a degree in other fields. Similarly, faculty members may not have deep interest in periodic cleaning of building exteriors.

The concentric circle approach suggests that faculty and staff jointly participate in decision-making committees where their interests are mutually present. It is particularly where their concerns overlap that they have the most to say to each other and to administration. For example, both faculty and staff have a strong interest in finding ways of providing parking and child care for employees in satisfactory fashion and at a reasonable rate. The concentric circle approach also applies to the faculty relationship with other groups in academia. In fact, a series of concentric circles can be pictured involving faculty, staff, students, administration and trustees, all arranged so that there is some potential overlap among all concerned groups.

One advantage/disadvantage possessed by staff groups is that they typically do not have the department and school infrastructure found in the faculty. This means that many of the participative staff entities will have to be established *de novo*. On the one hand, the committees will not have a vested interested history which may require some undoing. On the other hand, they will have to learn to work with each other and other groups in ways which may require new adjustments.

It must be admitted that faculty may need some re-education about the important and necessary role of staff personnel. Faculty, at times, feel they are the university and do not always recognize the complex infrastructure which sustains them. Joint participation in overlapping areas can be an eyeopener for all concerned.

STUDENT GROUPS

Lip service for student involvement is present among many members of faculty, staff and administration. At bottom, I suggest that some of the verbal support is simply politically correct. I have heard too many members of the college and university community privately make the point that the best and most difficult students are all transitory. "Wait a while, and they will go" is the message.

A few comments. First, there are few areas of academia which do not affect students. To me, this means that anything which is worked out elsewhere in participative committees and then is issued as an ukase has an uphill battle in winning student support. Second, the question of privileged information is often raised as a basis for student exclusion from committees. Since personnel actions are not part of the mandate for these committees, I suspect that there is little in the way of participative planning which truly has to be kept secret. The basis for necessary exclusions is at least a proper topic for student groups. Third, although students have broad interests in almost anything which goes on at a university, they may well wish to limit their participation to key, specified areas of interest. Certainly, the question of appropriate confidentiality will have to be pursued.

In any event, I am high on the involvement of students in participation in higher education decision-making.

ROLE OF ADMINISTRATION

Most participative committees in private industry start out (and many remain) as advisory committees. Management usually has the final say unless a given topic is negotiable or otherwise involved in joint decision-making. Management has a strong reserve power, but it must recognize that it cannot routinely turn down participative committee outcomes. In fact, there may be situations where all concerned are agreed that the participative committee can make final decisions.

Additionally, there is the problem of unrepresented groups in the participative structure. For example, the faculty may be organized at all but the health-science and law schools. Should these be treated as separate entities for participation purposes? I suggest that it is desirable again to make use of the concentric circle approach. There may be specific topics where organized and unorganized personnel wish to and can effectively come together. I had a military tactics lesson in the army in which the instructor made the point that strategy and tactics often "depended on the situation and the terrain." The comment is accurate even though it may not give us immediate policy guidance. Much will depend on the unique aspects of every environment.

One frequent part of the management (and often the union role in participation) is the requirement that joint participative topics exclude those items which are negotiable in collective bargaining. This is an easy requirement to live with early in the participative process. It becomes progressively more difficult as contributions are made through participation which have a positive monetary impact. Inevitably, there will be a legitimate request for benefit sharing for bargaining unit members. The parties must be prepared for this eventuality and develop appropriate mechanisms to deal with the issue.

Administration must also keep the trustees informed of participative activity. Trustees in academia, concerned with skyrocketing costs, appear determined to play

greater roles in the running of their institutions than has been true in the past. While I do not see them sitting on joint committees, there may be special exceptions. Most important, they need to know what is going on so there will be no surprises. The obvious balance is between necessary and premature communication, as is true with overlapping concerns of organizational groups.

TEN PRINCIPLES OF PROFESSIONAL PARTICIPATION

The principles listed below represent a distillation of the author's experience and the wide literature which has developed on the subject. I have sought to adapt them to academia, where appropriate. Although each of them may have a role in a given situation, I recognize that some of the principles may have limited applicability for good, local reasons. The parties involved are free to mix, match or add to the list.

1. All interested entities must want participation. A joint effort will not work unless a clear majority of all groups to be involved wish to participate in the effort. This does not mean that a vocal minority should be allowed to subvert the process. Nor does it prevent an individual from participating in what is otherwise a campus-wide effort. Positive examples from other institutions will help.

2. Use a facilitator. There are many well-trained individuals who can bring their skills to bear on the complexities of establishing new participation modes in academia. Fortunately, many of them are faculty members in higher education and, although a good part of their experience may have occurred outside of higher education, they understand the academic environment. In fact, it is not that difficult to find facilitators with higher education experience.

3. Rational agenda limitations. Personnel and similar matters must be considered out-of-bounds. Whether or not a bargaining agent is present, the types of topics considered to be mandatory collective bargaining subjects, at least initially, should not be addressed by participative committees.

4. Plan on attempts to end the process. Almost invariably, there will be concerns (frequently from employee groups) that the new approaches are not producing satisfactory results. Emphasis must be given to dealing with unrealistic expectations, and all concerned must anticipate pressure to end the activity. It will help if people know what to expect. The facilitator will be aware of and prepared to deal with the problem.

5. Establish necessary multi-groups. When a topic cuts across the interests of more than one campus group, a multi-group participative unit may be needed. This does not preclude a group from

concentrating on an aspect of an issue which concerns them directly in meetings with the administration.

6. Use existing instrumentalities wisely. A well-established committee (with necessary additions) may well be the proper participation instrument. If the committee is itself part of the problem (for whatever reason), the central steering group will have the difficult, but necessary, task of finding a way to deal with the situation.

7. Communication and confidentiality. There will be considerable interest among all involved in knowing what is happening. General summaries of the areas under discussion are desirable. At the same time, all concerned must understand that tentative outcomes are subject to change, and committee members will have limits on what can be communicated. Violation of confidentiality may require replacement of committee members.

8. Students and trustees will require special attention. Both students and trustees will have legitimate concerns about both process and outcomes. It will be important to address their needs within the context of the total participative activity.

9. Sharing of gains. As the activity unfolds, experience suggests that the participants will find cost-effective improvements. Once the cost savings have been documented, they can enter into future gain sharing through bargaining or other mechanisms. Experience with other plans suggests that financial gratification, when clear cost savings have been achieved, is desirable if the effort is to continue to be successful.

10. Maintaining effective participation. If the parties plan participation as a long-term, continuing effort, they will find that all systems of this type run into fallow periods somewhere between three and five years. It will be up to the parties to recognize the symptoms (failure to integrate environmental and organizational changes, new leadership personnel and styles and an uneasy sense that the end of the line has been reached in participation). At the proper time, it will be necessary to take a fresh look at the participative mechanisms and approaches to determine what type of basic changes are in order.

Sounds like a lot of work. It is. But, given the choice, I would rather do this than, for example, engage in the endless, voluminous documentation needed for accreditation. Somehow, proving how well we did in the past is not as appealing to me as learning how to make tomorrow better.

ENDNOTES

1. NLRB v. Yeshiva University, 48 U.S.L.W.175 (U.S. February 20, 1980).

2. Electromation, Inc., 309 NLRB No. 163, 1992-93 CCH NLRB 17,609 (1992).

VI. ANNUAL LEGAL UPDATE

A. The Management Perspective

B. The Union Perspective

ANNUAL LEGAL UPDATE

A. HIGHER EDUCATION COLLECTIVE BARGAINING LEGAL UPDATE: MANAGEMENT PERSPECTIVE

Ira Michael Shepard, Esq.
Schmeltzer, Aptaker & Shepard, P.C.
Washington, DC

INTRODUCTION

During the course of the past year, the National Labor Relations Board ("NLRB" or "the Board") was confronted with significant issues which impacted all employers.

This paper presents five important issues which the Board dealt with during the past year, and a sixth issue of overriding concern on college campuses — sexual harassment. Briefly, the issues we discuss are as follows: First, the NLRB in Management Training Corp. overruled its long-standing precedent regarding the determination of the Board's jurisdiction over an employer with ties to a government entity. Recognizing that its prior decision in Res-Care, which focused on the degree of control exercised by the employer and the government entity, was "unworkable and unrealistic," the Board stated that it will now exercise jurisdiction over private employers with close ties to government entities provided the employer meets the definition of "employer" set forth in the National Labor Relations Act (NLRA) and satisfies the monetary standards.

Second, the Board issued a complaint against an employer who discharged an employee for refusing to work during a strike, finding that the strike was in protest of the unlawful discharges of other employees, and therefore the employee's conduct in refusing to cross the picket line was privileged.

Third, the Board dismissed charges against an employer who established a cadre of ombudspersons to assist employees in the grievance process, finding that the group of ombudspersons was not an employer controlled "labor organization" within the meaning of the NLRA, in violation of Section 8(a)(2), as it did not involve employee participation.

Fourth, the Board concluded that an employer's practice of requiring employees and applicants to sign mandatory arbitration agreements violates the NLRA, as the agreements require an employee to waive his statutory rights to file a charge with the NLRB.

Fifth, the Board's handling of the major league baseball negotiations should serve as a case study reminder and warning to management that you cannot, during labor negotiations, unilaterally impose a change in a mandatory subject of bargaining.

Sixth, and finally, we discuss a case of national significance, i.e. a professor's assertion of academic freedom and the First Amendment as a defense to a sexual harassment investigation — he was not successful in his attempt to avoid the investigation.

I. NLRB OVERTURNS NINE-YEAR JURISDICTIONAL PRECEDENT

This past summer, the National Labor Relations Board took a 180 degree turn and overruled its long-standing and well-established precedent of when the Board has jurisdiction over an employer with close ties to a government entity.

The test of whether the Board has jurisdiction over an employer who is tied to a government entity was first articulated in the NLRB's 1986 decision in Res-Care, Inc.[1] In determining whether it could exercise jurisdiction over Res-Care, an employer with close ties to the Department of Labor, the Board concluded that it had to examine the degree of control exercised by both the employer and the government entity over the terms and conditions of employment in order to determine whether the employer could engage in "meaningful" collective bargaining.[2] Specifically, the Board held that "if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible."[3] Accordingly, the Board declined to exercise jurisdiction over Res-Care, reasoning that, as the Department of Labor controlled the economic terms and conditions of employment, Res-Care was unable to participate in the "give-and-take" required to ensure that the collective bargaining process was "meaningful."[4]

In Management Training Corp.[5] the Board was once again confronted with the issue of whether it could exercise jurisdiction over an employer who operates a job corps center pursuant to a contract with the Department of Labor (DOL). As in Res-Care, the employer could not modify the terms and conditions of employment without approval from the Department of Labor.[6] In addition, the employer was required to adhere to DOL procedures concerning employee status decisions.[7] The employer therefore argued that, under Res-Care, the Board lacked jurisdiction over it, as the Department of Labor exercised a significant amount of control over the terms and conditions of employment.[8]

Recognizing that the Board's assertion of jurisdiction over employers with close ties to government entities since Res-Care has been less than consistent,[9] the Board concluded that the test set forth in Res-Care was "unworkable and unrealistic,"[10] inconsistent with Supreme Court precedent,[11] and an "over-simplification of the bargaining process."[12]

The Board recognized that, as the economic climate is changing, monetary issues may not be the central focus of the bargaining process; rather, the focus may be upon issues regarding job security, flexibility in work assignments, and other intangible benefits.[13] Consequently, the Board stated that its prior conclusion that bargaining was meaningless unless the employer had ultimate authority over the economic conditions of employment was "shortsighted."[14]

Moreover, the Board recognized that its decision in Res-Care was contrary to the well-established Supreme Court precedent that the National Labor Relations Act was not enacted to regulate substantive terms and conditions of employment which are governed by a collective bargaining agreement.[15] The Board in Management Training Corp. viewed the Res-Care principle that collective bargaining was meaningless unless the employer had ultimate control over the economic terms and conditions of employment as an intrusion into the substantive terms of the negotiation process, as it favored economic terms of employment over other terms and conditions.[16]

The Board in Management Training Corp. therefore concluded that jurisdiction should no longer be based upon which party exercises a greater degree of control over the terms and conditions of employment:[17] "[W]hether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case."[18] Consequently, the Board overruled Res-Care and held that it could exercise jurisdiction over an employer with ties to a government entity provided the employer met the definition of "employer" set forth in Section 2(2) of the National Labor Relations Act[19] and satisfied the monetary jurisdictional requirements.[20]

As the Board is no longer concerned with the degree of entanglement between the employer and the government entity, this decision could have serious implications for public colleges and universities. Institutions which were exempt from the Board's jurisdiction under Res-Care may now find themselves parties to unfair labor practice charges and subject to the Board's jurisdiction.

II. STRIKE PROTESTING DISCHARGE NOT PROHIBITED BY NO-STRIKE CLAUSE

This past year, the NLRB issued a complaint against an employer who discharged an employee for striking in protest over the unlawful discharge of six other employees.[21]

A construction company employed individuals governed by a collective bargaining agreement which contained a no-strike clause. When a different union began campaigning at some of the job sites, the employer discharged six employees who were involved in the organizing campaign. The rival union began striking in protest. An employee who was a member of the rival union refused to cross the picket line and was subsequently discharged for violating the no-strike clause.

The issue presented to the NLRB was whether the discharges of the employees involved in the organizing campaign was an unfair labor practice which would render the actions of the employee who refused to cross the picket line privileged.

In addressing this issue, the Board relied upon Supreme Court and NLRB decisions interpreting no-strike clauses. The Board recognized that in Maestro Plastics Corp. v. NLRB,[22] the Supreme Court held that a no-strike clause does not prohibit strikes which are "destructive of the foundation upon which collective bargaining must rest."[23] The Board recognized that it subsequently interpreted this language to mean that strikes protesting employer conduct which interfered with an employee's right to choose its bargaining representative in violation of the NLRA were protected from the prohibition of a no-strike clause.[24] Likewise, the Board recognized that in Servair Inc., it stated that a no-strike clause does not prohibit strikes in protest of conduct which undermines an employee's "free choice of a bargaining representative."[25]

The issuance of a complaint in the instant case was based upon the Board's conclusion that the six employees were discharged for the purpose of denying the employees their right to choose a particular union, thereby interfering with their right of association.

III. NLRB DISMISSES CHARGE, FINDING THAT CADRE OF OMBUDSPERSONS IS NOT A LABOR ORGANIZATION WITHIN THE MEANING OF THE NLRA

The NLRB recently dismissed a charge against an employer who established a cadre of ombudspersons to resolve employee complaints on the grounds that the employer did not violate Section 8(a)(2) of the National Labor Relations Act.[26]

Utilizing both a formal and informal grievance process to resolve employee complaints, the employer established a program whereby an employee, during the informal process, was able to speak confidentially to an ombudsperson, who acted as a neutral party and did not "represent anyone." The ombudspersons were classified as management-level employees who were authorized to conduct research for the employee, present alternate courses of action and recommend policy changes to management. The ombudspersons, however, were not authorized to participate in the formal grievance process.

Concurrent with the establishment of the cadre of ombudspersons, the employer established a Grievance Administration Office which provided employees with a "coach" to guide them through the formal grievance process. The coaches assisted in the preparation of written grievances, suggested alternate arguments, and accompanied the employee to hearings. The coaches, however, were not authorized to present the employee's position on his behalf.

Section 8(a)(2)of the NLRA makes it an unfair labor practice for an employer to "dominate or interfere" with a labor organization.[27] To determine whether a committee constitutes a labor organization, the Board, in Electromation, Inc.,[28] set forth three necessary elements which must be satisfied: "(1) that employees participate in the organization or committee; (2) that the organization or committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) that these "dealings" concern such statutory subjects as grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[29]

With regard to the ombudspersons, the Board concluded that the employer did not violate Section 8(a)(2), as the cadre of ombudspersons was not a labor organization under the Electromation test. The ombudspersons were classified and paid as management-level employees and merely acted as members of management in relaying suggestions to the employer. The Board therefore concluded that the cadre of ombudspersons were not employees, and thus the first element of the Electromation test could not be satisfied.

With regard to the grievance coaches, the Board found that there was employee participation, as any employee could be a coach. The Board concluded, however, that the employer did not violate Section 8(a)(2), as the grievance coaches did not "deal with" the employer. Although a coach could assist an employee in filing a complaint and drafting arguments, the coach could not present the employee's position to the company. Thus the second element of Electromation could not be satisfied. Accordingly, the Board dismissed the charge against the employer, finding that the employer did not interfere with or dominate a labor organization.

IV. MANDATORY ARBITRATION AGREEMENTS VIOLATE SECTION 8 (a) (1) AND 8(a)(4) OF THE NLRA

In another case before the NLRB, the Board concluded that mandatory arbitration agreements which require that employment claims be submitted to binding arbitration before being brought before another forum, and the discharge of an employee based upon his refusal to sign such an agreement, violated Sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act.[30]

Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their rights to organize and bargain collectively.[31] Section 8(a)(4) makes it an unfair labor

practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."[32]

The employer in the instant case required employees and applicants to sign a mandatory arbitration agreement, whereby they agreed to submit any employment dispute to binding arbitration. Further, the employer discharged a competent and able employee merely because he refused to sign such an agreement.

Recognizing that it is a violation of the NLRA when an employer requires an employee to relinquish his rights to file charges with the NLRB, the Board concluded that the agreement in the instant case did exactly that, as the agreement forced an employee to submit his claims to arbitration rather than file charges with the Board.

The employer argued that his agreement was valid under the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp.,[33] which held that an agreement to arbitrate employment disputes contained in a securities registration form was valid. The Board rejected this argument, finding that Gilmer was not applicable to the instant case.

The Court in Gilmer stated that mandatory arbitration agreements are valid "unless Congress itself evidenced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[34] In the present case, the Board recognized that Section 10(a) of the NLRA authorizes the Board to remedy unfair labor practices regardless of the other forums available. The Board therefore concluded that the agreement in the instant case precluded the Board from exercising its discretion of whether to defer to a grievance and arbitration provision of a collective bargaining agreement. Moreover, the Board stated that the employer's agreement prohibited the Board from exercising jurisdiction over employers, as the filing of an NLRB charge is the predecessor to the Board's assertion of jurisdiction.

The Board further rejected the employer's argument that its agreement merely required the employee to submit his claim to arbitration before seeking relief from the Board. As the statute of limitations under the NLRA is six months, and submitting a claim to arbitration results in serious time delays, the Board concluded that the employer's "purported protection" of an employees' statutory rights was "meaningless."

V. THE MAJOR LEAGUE BASEBALL NEGOTIATIONS[35]

The major league baseball strike drew national attention as games were canceled for virtually the entire season. The background of the suspension of this "national pastime" involved basic principles of collective bargaining.

For over a century, baseball players bargained with baseball clubs for individual contracts which set the player's salary. In 1976, the parties began to utilize the free agency principle, which allowed players with six or more seasons of major league experience to seek bids from all team owners, in an attempt to obtain the best contract. To promote this end, the Basic Agreement contained a provision precluding the owners from colluding with each other.

Those players with less than six seasons of major league experience continued to be employed under a "reserve" system, which meant that the player could only negotiate terms and conditions of employment with the one club to which he was reserved. Certain reserve players could insist upon "salary arbitration," whereby a neutral arbitrator set the player's salary based upon the proposals submitted separately by the player and owner[16]

As the contract between the players and the owners expired at the end of 1993, negotiations for a new contract began in March 1994. The Players Association began a strike on August 12, 1994, and in December, the owners declared an impasse, before an actual impasse had been reached, and announced that they were implementing a salary cap and eliminating the salary arbitration and anti-collusion provisions, as they believed these terms were permissive subjects of bargaining. With respect to the free agents, the owners intended to act in concert with each other over wages prior to negotiating with the players.

Recognizing that in professional sports component parts of free agency and reserve systems are mandatory subjects of bargaining,[17] the NLRB concluded that the owners violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by abolishing the provisions concerning competitive bidding for free agents and salary arbitration for reserve players.

As the salary arbitration provision in the present case linked the market value of free agents to the reserved players' salaries, the Board stated that the salary arbitration provision was therefore similar to right of first refusal provisions, which are likewise tied to competitors' bids, and which have been upheld in other cases. In concluding that the salary arbitration provision was a mandatory subject of bargaining, the Board distinguished the provision from interest arbitration provisions. The Board relied upon decisions which found that interest arbitration provisions are mandatory subjects of bargaining if they have an instantaneous effect on mandatory subjects of bargaining or are significantly entangled with such provisions. The Board further distinguished the instant provision from traditional interest arbitration on the grounds that when a player requests salary arbitration, he already has a contract, and thus the arbitrator is not deciding a condition of employment for a future contract.

The Board further stated that competitive bidding itself was a mandatory subject of bargaining, as it was dependent upon the player's value in the free market, and that terms and conditions which are contingent upon competitive bidding are likewise mandatory subjects of bargaining. Applying this rationale, the

Board concluded that the anti-collusion provision of the contract was a mandatory subject of bargaining which could not be unilaterally changed.

In essence, the Board found that the owners unilaterally changed mandatory subjects of bargaining, and therefore concluded that the owners actions were in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.

VI. SEXUAL HARASSMENT ON COLLEGE CAMPUSES

A growing concern among colleges and universities today is allegations of sexual harassment brought against faculty members. In a recent case, the United States District Court for the Central District of California held, in Cohen v. San Bernardino Valley College,[38] that the comments of a college professor on pornography and other sexually oriented topics as part of his curriculum may be matters of public concern, but are not protected by the First Amendment.

A tenured professor, Dean Cohen, used a confrontational teaching style which included profanity and vulgarity. His classroom discussions often focused on obscenity, consensual sex with children, and cannibalism.[39]

Anita Murillo, a student, was offended by the topics discussed in Cohen's class, his use of profanity, and the humiliating and harassing comments he directed towards women.[40] During a discussion on pornography, Cohen read articles from Hustler and Playboy, and afterwards required his students to write an essay defining pornography. When Murillo asked for an alternative assignment, Cohen refused.[41]

After an investigation prompted by Murillo's complaints, the Faculty Grievance Committee found that Cohen violated the college's policy against sexual harassment.[42] Cohen argued that his right to academic freedom precluded the college from punishing him for his classroom conduct and issuing a restrictive order on his curriculum.[43]

The court held that the boundaries of academic freedom are not clear cut, but noted that generally courts have declined to allow teachers to have absolute control over their classroom.[44] The court found that Cohen's speech was not protected by the doctrine of academic freedom.

The court next addressed the First Amendment issue regarding the government's ability to regulate the speech of government employees. In assessing whether Cohen's use of profanities and his focus on sexual issues is a matter of public concern, the court applied a two-prong analysis. The first prong addresses whether the speech is a matter of public concern.[45] If the speech is not a matter of public concern, then it is not protected by the First Amendment and can be restricted by the college.[46] If the speech is a matter of public concern, the burden shifts to the college to show that the speech interferes with the college's mission

of providing education, and that this disruption outweighs the professor's interest in self-expression.[47]

The court found that Cohen's use of profanity and vulgarity was not of public concern, and therefore not protected by the First Amendment.[48] With regard to Cohen's discussion of sexual topics, the court concluded that pornography and sexually-oriented topics were matters of community interest and therefore matters of public concern.[49]

Recognizing that colleges must have the power to effectively educate all students, the court found that Cohen's classroom conduct disrupted the educational process by creating a hostile, offensive environment, thereby preventing students from learning.[50] Accordingly, the court found that Cohen's speech was not protected by the First Amendment.

It has been an eventful year of developments affecting all aspects of Labor and Employment Law.

ENDNOTES

1. 280 NLRB 670, 122 LRRM (BNA) 1265 (1986), overruled by Management Training Corp., 317 NLRB No. 190, 149 LRRM (BNA) 1313 (1995).

2. 280 NLRB at 672, 122 LRRM (BNA) at 1267-68.

3. 280 NLRB at 674, 122 LRRM (BNA) at 1269.

4. 280 NLRB at 674, 122 LRRM (BNA) at 1269-70.

5. 317 NLRB No. 190, 149 LRRM (BNA) 1313 (1995).

6. 149 LRRM (BNA) at 1314.

7. Id.

8. Id.

9. See Id. at 1315.

10. Id. at 1314.

11. Id. at 1316.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id.

17. Id. at 1315.

18. Id. at 1314.

19. "Employer" includes "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof, . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2).

20. Management Training Corp., 149 LRRM (BNA) at 1317.

21. See NLRB General Counsel Report, January - September 1995 ("General Counsel Report"), Daily Labor Report, Feb. 23, 1996, at E-4.

22. 350 U.S. 270 (1956).

23. General Counsel Report at E-4 (citing Mastro Plastics, 350 U.S. at 281).

24. General Counsel Report at E-4 (citing Arlan's Department Store of Michigan, Inc., 133 NLRB 802, 804-05 (1961)).

25. General Counsel Report at E-4 (citing Servair Inc., 265 NLRB 181, 183 (1982), enf'd, 726 F.2d 1435 (9th Cir. 1984)).

26. General Counsel Report at E-4 to E-6.

27. 29 U.S.C. § 158(a)(2).

28. 309 NLRB 990 (1992), enf'd, 35 F.3d 1148 (7th Cir. 1994).

29. General Counsel Report at E-5 (citing Electromation, 309 NLRB at 994).

30. General Counsel Report at E-6 to E-7.

31. 29 U.S.C. § 158(a)(1).

32. 29 U.S.C. § 158(a)(4).

33. 500 U.S. 20 (1991).

34. Id. at 26 (citation omitted).

35. General Counsel Report at E-18 to E-19.

36. During this process, the player and owner would each submit a proposal. The arbitrator was then limited to picking a salary from one of the two proposals submitted. See General Counsel Report at E-18.

37. If a term or condition is a mandatory subject of bargaining, the employer and the union are required to bargain over the substance of the provision.

38. 883 F. Supp. 1407 (C.D. Cal. 1995).

39. Id. at 1410.

40. Id.

41. Id.

42. Id. at 1410-11.

43. Id. at 1412.

44. Id. at 1412-15.

45. Id. at 1415.

46. Id.

47. See Id. at 1415, 1417-20.

48. Id. at 1416.

49. Id. at 1417.

50. Id. at 1418-20.

ANNUAL LEGAL UPDATE

B. HIGHER EDUCATION COLLECTIVE BARGAINING LEGAL UPDATE: THE UNION PERSPECTIVE

David J. Strom, Esq., In-House Counsel
and Stephanie Baxter, Esq., Associate Counsel
American Federation of Teachers

INTRODUCTION

In preparing this paper we have attempted to be faithful to the title given to this session and provide an update of significant legal developments impacting higher education. However, I have branched off from the course followed by others who have done the update in the past by looking to developments not only on the national scene, but also to those at the state court level as well. Some might suspect that I am responding to the current interest in state's rights so vigorously espoused by a few in the 104th Congress, but I assure you that is not the case. Instead, this outline represents a selective interpretation from one practitioner of the significant legal developments for those in higher education.

I. STATE AND LOCAL BARGAINING

A. Scope of Bargaining

The Supreme Court of Pennsylvania addressed the question of whether the provisions of a state pension recovery act were in conflict with the Pennsylvania Public Employee Relations Act in City of Pittsburgh v. Commonwealth.[1] In that case the City enacted a revised pension plan, pursuant to the Act, which reduced benefits for newly hired employees. In response, AFSCME filed an unfair labor practice based on the City's implementation of the plan, pursuant to the Act, which reduced benefits for newly hired employees. In response, AFSCME filed an unfair labor practice based on the city's implementation of the plan without entering into mandatory negotiations with the union.[2] The court determined that the City's decision to avail itself of the pension recovery program of Act 205, was an "inherently managerial decision," and thus, outside the scope of mandatory bargaining.

The Supreme Court of Hawaii addressed a similar issue in University of Hawaii Professional Assembly v. Tomasu.[3] In that case, the Court was called upon to decide whether the Board of Regents of the University of Hawaii

committed an unfair labor practice when it promulgated and distributed a policy in accordance with the Drug-Free Workplace Act. The Court determined that because the policy statement merely complied with Federal Law, its initial promulgation was not bargainable. However, reversing the lower court, the Supreme Court held that as the Drug Free Workplace Act inherently mandates implementation, the union did not have to wait until the Board of Regents attempted to implement the act to bargain, but rather, the union could initiate bargaining at any time upon such topics.

B. Impairment of Contracts

Consistent with the majority of Courts that have decided the issue, the Supreme Court of Massachusetts ruled in Mass. Community College Councils v. Commonwealth that the implementation of a furlough program for State employees violated the contract clause of the United States Constitution because the program impaired compensation provisions in a variety of collective bargaining agreements.[4]

C. Unfair Labor Practices

In Board of Trustees of the University of Maine, the Supreme Court of Maine vacated a decision by the Maine Labor Relations Board which held that the University of Maine system breached its duty to bargain in good faith by discontinuing the annual step increase in wages included in the collective bargaining agreement upon expiration of the agreement.[5] The court asserted that the definition of "status quo" in the Maine Labor Relations Act, which requires employers to maintain the status quo following contract expiration, was the crux of the case.

The court explained that until 1991, the Maine Labor Relations Board had "construed status quo to mean that wages existent at the expiration of the collective bargaining agreement were frozen." Then, in 1991, reversing its position, the Board adopted a "dynamic status quo rule" which required public employers to pay any annual step increases contained in the expired agreement. The court found that the application of the dynamic status quo rule was unfair as the agreement in question was negotiated prior to the Board's reversal of its position and the parties negotiated with the static status quo rule in mind. Moreover, the court found that the Board had adopted the new rule in contravention of the statutory language and legislative history of the Maine Labor Relations Act.

A Pennsylvania court upheld a Pennsylvania Labor Relations Board (PLRB) decision dismissing an unfair labor practice charge by the Association of Pennsylvania State College and University Faculties (APSCUF) because the charge was prematurely filed.[6] In that case, the Board of Governors of the State System of Higher Education (SSHE) adopted a policy regarding a new job category and APSCUF argued that an unfair labor practice occurred when the employer

unilaterally created a new classification of employees and assigned them work performed by the APSCUF bargaining unit.

The Board found that APSCUF was informed about the new classification, although bargaining did not take place, that no individual held the new position yet and that it was possible unit work would not be assigned, as a labor relations representative testified that duties might be wholly administrative, which would not constitute APSCUF unit work. As such the Board determined the charge was premature since action had not been implemented, and further PLRB was unable to determine its relative impact on the parties involved and dispositively rule upon whether an unfair labor practice occurred. The court upheld this determination.

D. Unit Determinations Regarding Graduate Teaching Assistants and Adjunct Faculty

Over the last year, several interesting unit determination cases arose. In late 1994, for instance, the Kansas Public Employee Relations Board determined in K.A.P.E. v. Board of Regents, that graduate teaching assistants (GTA's) were "public employees" within the meaning of the Kansas Public Employer-Employee Relations Act ("PEERA") and as such, were entitled to form, join, and participate in employee organizations, as provided by statute.[7] Although this case occurred in 1994, it is included in this analysis because the Board opinion is thorough and well reasoned.

The University argued that the GTA's should be considered students rather than employees and urged the Kansas Board to adopt the reasoning of the NLRB, as set forth in Cedars-Sinai Medical Center[8] and St. Clare's Hospital and Health Center.[9] In those cases, the NLRB held that medical house staff, students participating in graduate medical training programs, were not "employees" under the NLRA since they were primarily engaged in graduate education training, as opposed to the normal employment relationship. This test has come to be known as the "primary purpose" test.

The Kansas Public Employee Relations Board, however, pointed out that the majority of states which addressed the issue of student employee bargaining rights had departed from the NLRB line of cases and found students to be employees under state collective bargaining statutes. Thus, the Kansas Public Employee Relations Board rejected the primary purpose test and adopted a two-step "balancing of interests" test. In determining whether students are employees:

> The first part of the process involves a balancing test to weigh the significance of the educational objectives against the importance of the services rendered. On the educational objectives side of the scale, the Board should consider: (1) the subjective motivation of the resident's for participating in the University's graduate medical training program; (2) the employer's treatment of the house staff as students as evidenced by faculty administrative statements and conduct; and (3) indicia of student status. On the "services" side of

> the scale, PERB should consider the following: (1) indicia of employee status; (2) the employer's treatment of housestaff as employees as shown by faculty administrative statements and conduct; and (3) agency principles of master-servant.[10]

Applying this test to the voluminous facts in the record, the Board found "GTA educational objectives to be subordinate to the services performed."[11]

The Board stated that part two of the balancing test was to "assess whether granting collective bargaining rights to GTAs would further the purposes of PEERA[,]"[12] which involved questions of fact and policy. Since GTA bargaining seemed to further the overriding purpose of the statute, to promote orderly and constructive relationships between public employees and their employers, and since the legislature did not specifically exempt GTA's from PEERA coverage, the Board determined that bargaining rights should be extended to GTA's.

Although the Board spent the bulk of its time applying the test discussed above, it did note that a "guiding purpose" test might also be applied. Under such an approach: "the focus is on factors which indicate the program is operating to benefit the student (i.e. is educational), as opposed to such benefit being more for the employer and only incidental to the student (i.e. is business based)."[13] Students would obviously be considered employees if, as here, the education objectives are subordinate to the business objectives.

In another case involving student employees, the California Public Employment Relations Board (PERB) indicated that it could change its position regarding the status of student employees under California's Higher Education Employer-Employee Relations Act (HEERA). In Regents of the University of California,[14] the Board upheld an ALJ opinion which declined to dismiss requests for recognition to represent student employees in research and teaching assistant classifications at several state campuses. Although PERB previously decided that graduate student employees were not employees within the meaning of HEERA,[15] the ALJ believed that the prior determination was not dispositive because no representation was in place and petitioner's claimed changed circumstances. This decision was an interlocutory appeal filed by the Regents of the University of California and at the time of publication, a published decision had not been rendered on the matter.

In a dispute concerning who constituted a bargaining unit of adjunct faculty at a community college, the Appellate Court of Illinois, in William Rainey Harper College, analyzed several important sections of the Illinois Education Labor Relations Act.[16] Under the Act, "educational employees" are entitled to bargaining rights, whereas "short term employees" are not entitled to such rights. According to the Act, "educational employees" are individuals employed full- or part-time by an educational employer.[17] "Short term" employees are: (1) employed less than two consecutive calendar quarters during a calendar year and (2) do not have a reasonable assurance of being rehired by the same employer for the same service in a subsequent calendar year.[18]

In Rainey the Illinois Court held that the words "calendar year" in the Education Labor Relations Act meant academic calendar year. Additionally, the Court addressed whether adjunct faculty had a reasonable assurance of reemployment and held they did not. However, at the end of the opinion, the court indicated that certain adjunct faculty, who consistently teach each semester, should not be considered "short term" employees and remanded the case.

E. Other Unit Determination Issues

The Appellate Court of Illinois in Black Hawk College also reviewed an order of the Educational Labor Relations Board dismissing the self determination petition of two separate units of the same union who sought a merger.[19] The Court determined that the bar against holding an election in any bargaining unit during the term of a collective bargaining agreement covering such unit did not apply to a self determination petition which sought to merge two existing units of the American Federation of Teachers, where the merger would not have significantly altered the collective bargaining relationship between the employer and the union.

Further, the Court held that although the bargaining units were different, to the extent that one represented professional and technical employees and the other represented full-time college faculty, there still existed sufficient community of interest for merger, since a proposed unit must simply be an appropriate unit, not the most appropriate unit. In making this determination, the court considered the fact that the majority of employees in the first unit and all employees in the second unit held at least bachelor's degrees, there was a high degree of integration and contact between the two units, many working conditions were similar and both groups exhibited a strong desire to merge.

II. SIGNIFICANT STATUTORY CHANGES AFFECTING BARGAINING

Illinois recently amended its Education Labor Relations Act by adding a new section which severely restricts the bargaining rights of employees in the Cook County Community colleges and other educational employees.[20] The pertinent section of the bill states:

> A) Notwithstanding the existence of any other provision in this Act or other law, collective bargaining between an educational employer whose territorial boundaries are coterminous with those of a city having a population in excess of 500,000 and an exclusive representative of its employees shall not include any of the following (emphasis supplied):
>
> > 2) Decisions to contract with a third party for one or more services otherwise performed by employees in a bargaining unit, the procedures for obtaining such

contract or the identity of the third party, and the impact of these decisions on individual employees or the bargaining unit.

3) Decisions to layoff or reduce in force employees (including but not limited to reserve teachers or teachers who are no longer on administrative payroll) due to lack of work or funds, including but not limited to decline in student enrollment, change in subject requirements within the attendance center organization, closing an attendance center, or contracts with third parties for performance of services, and the impact of these decisions on individual employees or the bargaining unit.

4) Decisions to determine class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies, and the impact of these decisions on individual employees or the bargaining unit.

5) Decisions concerning use and staffing of experimental or pilot programs, decisions concerning use of technology to deliver educational programs and services and staffing to provide the technology and the impact of these decisions on individual employees or the bargaining unit.

B) The subject matters described in subsection (A) are prohibited subjects of bargaining between an educational employer and an exclusive representative of its employees and, for the purpose of this Act, are within the sole authority of the educational employer to decide.

C) this section shall apply to collective bargaining agreements that become effective after the effective date of this amendatory act of 1995, and shall render a provision involving a prohibited subject in such agreement null and void.

While not apparent on its face, this bill, which is a major rollback of collective bargaining rights for college employees, is only applicable to the city colleges of Chicago.

Moreover in recent statutory based litigation, the Michigan AFL-CIO was largely unsuccessful in both the lower and intermediate state court in challenging broad ranging, anti-labor changes to Michigan's public sector bargaining law.[2] The lower court held that: (1) legislative prohibitions on required approval of an agreement by an organization other than the local union (i.e., a requirement that the

state organization also approve the CBA) did not violate free speech and association protections; (2) amendments directed at school employee organizations, as opposed to all public employee organizations, did not violate the equal protection clause; (3) new prohibited subjects of negotiation, largely related to school reform, did not violate rights of free speech, association, or equal protection; and (4) limitations on the right of expression which interfered with employment duties did not violate constitutional rights. However, the lower court did strike down sections which impose vicarious liability on unions representing public school employees for unauthorized strikes and sections mandating the issuance of injunctions against strikes without regard to traditional principles of equity as a violation of the doctrine of separation of powers. This decision was affirmed by the Michigan Court of Appeals. Recently, the Michigan Supreme Court granted an application for immediate consideration and leave to appeal.[22]

III. ARBITRATION

A. Deferral to Arbitration

In State ex rel. Johnson v. Cleveland Heights/University Heights Board of Education[23] the Ohio Supreme Court dismissed a teacher's writ of mandamus, finding the grievance procedure contained in the parties' collective bargaining agreement would have provided complete and adequate relief for her claims. The teacher at issue was seeking increased salary due to her acquisition of a law degree and after filing a grievance, the union later withdrew such grievance at the teacher's request and she subsequently filed for a writ of mandamus in state court to compel the school board to place her at the appropriate step of the salary schedule and pay her back wages.

In another promotion case, the District of Columbia Court of Appeals reversed a trial court judgment, based on a jury verdict, awarding a university professor $36,000.00 in damages for breach of contract.[24] In Myers, the Appeals Court reversed because it felt that the Superior Court lacked jurisdiction to entertain Myers' claims since he failed to exhaust his administrative remedies. Briefly stated, Myers applied to be promoted to full professor and received a faculty notice which granted the promotion. After signing and returning the notice, several days later he received a mailgram rescinding the promotion. Apparently, there was a question of whether his doctoral degree met university requirements because he received it from an unaccredited institution.

Myers was a member of the UDC faculty association and the applicable collective bargaining agreement contained a comprehensive grievance procedure. When the university rescinded its offer, Myers went through the first three steps of the grievance procedure. According to Myers and union officials, his case was not taken to arbitration because it was primarily an individual matter and the union had limited resources. Myers did not dispute the union's decision and filed his claim for breach of contract in Superior Court and prevailed.

The Court of Appeals held that because Myers did not take his complaint to the final step of the grievance procedure, arbitration, he failed to exhaust his administrative remedies. The court stated that although the union would not bring the case, Myers had an obligation to file an unfair labor practice against his union for failure to represent him before he could be held to have exhausted his administrative remedies.

B. Judicial Review of Arbitration

In keeping with the strong trend toward limited judicial review of arbitration awards, the Third Circuit reversed a District Court decision to vacate an arbitration award in United Transportation v. Suburban Transit.[25] In that case the Third Circuit ruled that the District Court failed to accord the arbitration decision proper deference. Below, the District Court had vacated the arbitration award, which reinstated a bus driver after he was involved in his 24th accident during his twelve years of employment with the company, on the grounds that the award was contrary to public policy and exceeded the scope of the arbitrator's jurisdiction. Specifically, the arbitrator found that while the driver was responsible for the accident, dismissal was too harsh a penalty for a long-term individual where the employee had not been afforded any opportunity to improve his driving skills through retraining.

The Third Circuit explained that the arbitrator had not exceeded his authority by returning the employee to work because he was simply interpreting the term "proper cause" as it was used in the contract and his decision may not be vacated simply because he interpreted a term in a manner unsatisfactory to management. Further, the Court noted that the award also could not be vacated on the grounds of public policy, stating that to vacate an award on public policy grounds, "the public policy must be well defined and dominant and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests."[26] In this case, the Third Circuit found that the employer failed to demonstrate how the award conflicted with any clear public policy and further noted that the award had an "eye toward public safety" since it encouraged retraining.

In Round Valley Unified School District v. Round Valley Teachers Association,[27] the California Court of Appeals reversed the trial court's finding that an arbitrator exceeded his authority when he ordered the school district to reconsider its decision not to renew a probationary teacher's contract. The court explained that statutory notice requirements for non-retention could be supplemented by additional procedures in a collective bargaining agreement. As the statutory rules do not prohibit a school district from providing teachers with increased protection, the Court reasoned that the arbitrator did not exceed his authority in ordering the Board to reconsider its decision.

Moreover, in Doe v. Central Arkansas Transit the Arkansas Court of Appeals held that an arbitrator did not violate public policy or fail to draw the

essence of the award from the collective bargaining agreement by determining that a public transportation company did not have just cause to terminate a bus driver who tested positive for cocaine.[28] In that case, the arbitrator found that overall, the grievant was a reliable employee, she had not operated the bus under the influence of drugs and that her cocaine use was an aberration resulting from drinking "spiked punch" at a party. Additionally, the arbitrator recognized safety concerns by conditioning the grievants return to work on random drug testing over a limited time period.

The court also noted that the arbitrator did not exceed his authority or fail to draw his award from the essence of the collective bargaining agreement because an employee could not be discharged merely for failing a drug test. Moreover, the award was consistent with the employer's policy which allowed employees who refused to take the test an initial return to duty.

D. Miscellaneous

In Falgren v. State,[29] a teacher terminated for improper conduct based on allegations of sexual contact with a student challenged the use of the arbitrator's decision upholding his termination in later proceedings by the state to revoke his license. The court overruled the license revocation on the ground that the ALJ impermissibly applied the doctrine of collateral estoppel thereby denying Falgren's due process rights to a hearing. Although the court indicated that the arbitrator's record could be used at the license revocation proceeding, the decision could not be used to collaterally estop the teacher's right to respond to the charges and, therefore, Falgren should be given a fair opportunity to supplement the record.

IV. DUE PROCESS RIGHTS OF FACULTY CHARGED WITH SEXUAL HARASSMENT

The extent to which tenured faculty members, terminated due to claims of sexual harassment, should receive due process protections is widely debated. The courts have recently issued several decisions affecting the outcome of this debate. These decisions rely upon past precedent to construct a new understanding of the due process rights of tenured faculty members. However, that understanding differs depending upon whether the employer is a private or public entity.

A. Tenured Faculty at Public Institutions

Tenure has clearly been accorded the status of a property right.[30] As such, before a public institution may remove this right, it must provide some level of procedural due process.[31] The Third Circuit recently considered what level of due process was necessary in McDaniels v. Flick.[32] In McDaniels, the court held that the question of what process is due is a question under the U.S. Constitution and not state law or agency rules. The court then reiterated that, at a minimum, a tenured public employee who has been terminated must receive "oral or written

notice of the charge against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[33] The court also noted, in keeping with Loudermill, that these requirements would be met if the institution held a simple pre-termination hearing and then provided post-termination remedies, such as arbitration or appeal rights.[34]

The court then proceeded to describe the "minimum due process pre-termination requirements where state procedure also provides...substantial post termination safeguards." The court held that advance notice of a pre-termination hearing was not required and court held that notice of the reasons for termination did not need to be in great detail. However, the court declined to comment on whether any delay was generally necessary beyond the pre-termination hearing in order to afford an opportunity for the employee to respond. Lastly, the court reiterated that due process does not require that the decision-maker at a pre-termination hearing be impartial.[35]

In Chan v. Miami University,[36] the Ohio Supreme Court took a somewhat different view of this matter. Chan holds that due process requires that terminated employees be given the right to counsel at all stages of the proceedings against them. This does not comport with the level of simplicity espoused for pre-termination proceedings in McDaniels. Chan also holds that a public university's failure to comply with its own termination procedures would violate due process requirements. This directly challenges McDaniels holding that federal law, and not agency regulations, will determine whether due process has been denied.

B. Tenured Faculty at Private Institutions

Tenured faculty at private institutions have fewer rights than tenured faculty at public institutions. In Logan v. Bennington College the Second Circuit Court of Appeals reiterated the well-established principle that the only substantive or procedural tenure rights held by privately employed tenured faculty members are those which can be found within their employment contracts.[37] In the Logan court's view, even where an employer has a duty of good faith and fair dealing to its employees, the employer is only obligated to protect those rights which are spelled out or can fairly be implied from its employees' contracts.[38]

However, the most important facet of the court's decision in Logan is its discussion of private employers acting as the "state." If a tenured faculty member at a private institution can prove that adverse action taken against them was "fairly attributable to the state," then that faculty member would have the same due process rights as a tenured faculty member at a public institution.[39] The employee in Logan, claimed that because the sexual harassment policy under which he was fired was mandated by the state, his employer was a "state actor." The court discussed this claim and stated that "state action would not be found unless the particular sanction under challenge was imposed as a result of the acts of state officials...or as a result of a reasonable and widespread belief by college or university administration that the imposition" of that particular sanction was

required by some particular state law. Therefore, privately employed faculty would only receive the full due process rights accorded to publicly employed faculty if some strong nexus to state action could be found in the manner described above.

V. SIGNIFICANT TENURE DECISIONS

In Board of Regents of Kentucky State University v. Gale[40] the Court of Appeals of Kentucky held that when a professor/scholar accepted the first appointment to an endowed chair by Kentucky State University, the professor had tenure in the University's endowed chair of Humanities, rather than tenure in a normal professor of humanities position. In reaching this decision, the court relied heavily upon the facts that neither the initial position advertisement, nor the letter offering Gale the position specified any term or time limitations upon the offer, which specifically included "tenure upon appointment." As Gale was duly appointed to the position, the court determined "[c]learly the appointment to which Gale was given the tenure was in the Endowed Chair."[41] The court also looked to customs in the academic community, stating: "unless the advertisement for the position otherwise indicated, it was customary and understood within the academic community that the chair was to be occupied by a designated colleague for his lifetime."[42]

Additionally, a Virginia District Court in Collins v. Univ. of Va. held that an assistant professor at the University of Virginia properly stated a claim that his tenure was denied due to "race and race-related associations"[43] against the University Board, the department, and the dean in his official capacity. Additionally, the court held that the professor had properly stated claims against certain individuals involved in the tenure process under §1981. Specifically, the professor alleged that he was denied tenure and was subject to an altered review process because he, a white male, married an African-American woman. Further, Collins claimed this discrimination arose because he was an advocate of African-American issues, such as minority outreach at the university and he spent time researching fair housing trends, and because he reprimanded a secretary for making a racial slur.

In a similar case, another district court held that a former Howard University professor established that triable issues of fact existed, such that the court could not grant summary judgment to the employer on her claims of sex and national origin discrimination in connection with a denial of tenure.[44] In Nayar, the professor, a female born and educated in India was denied tenure after serving on the Howard faculty for seven years. The court relied heavily upon the evidence that white males were treated more favorably, that plaintiff had an altered review process and that plaintiff unlike others, was not allowed to remain on the faculty while her application was reconsidered.

Additionally, the Illinois Court of Appeals reviewed a grant of summary judgment where the trial court found that the coming together of Loyola University and Mundelein College extinguished the tenure of Mundelein faculty in Gray v.

Loyla University of Chicago.[45] In that case, Mundelein signed a formal agreement with Loyola which established that Mundelein would be "governed and administered as a separate college of the University." Loyola agreed to retain most tenured faculty, but specified three tenured faculty that would be offered a two-year salary payment in lieu of continued employment. The court held that the tenured faculty members who refused the payment did not lose their rights enumerated in the college's handbook as the college continued to operate as an independent institution and factual questions existed regarding the college's obligation to safeguard the rights of tenured faculty in the event of affiliation or merger.

VI. COMPULSORY ARBITRATION OF DISCRIMINATION CAUSES OF ACTION

In Alexander v. Gardner-Denver Co., the Supreme Court addressed the issue of whether an employee's statutory right to a trial *de novo* under Title VII would be foreclosed by the prior submission of the claim to final and binding arbitration pursuant to a nondiscrimination clause in a collective bargaining agreement.[46] A unanimous Supreme Court held that a person may sue under Title VII, notwithstanding the fact that he/she submitted his/her claims to arbitration under a collective agreement and lost. Importantly, in so holding, the court stated that individual employee's statutory rights are separate and independent of any contractual rights the employee may possess under a collective bargaining agreement and that the union may not waive the individual rights of its members.

Many years later, in a case which many argue is difficult to square with the holding in Gardner-Denver, the Supreme Court held that an employee's claims under the ADEA could be subject to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application.[47] In Gilmer v. Interstate/Johnson Lane Corp., the Supreme Court did not overrule Gardner-Denver and although the cases had certain broad similarities, as many commentators have noted, the cases involved very different factual settings. Gilmer involved an individual agreement and was decided with reference to the Federal Arbitration Act, whereas Gardner-Denver dealt with a collective agreement, not covered by FAA rules.

In a very recent Fourth Circuit case, however, the Court made an astonishing leap by applying the Gilmer rationale to an employee's discrimination claims in a collective bargaining situation.[48] In Austin v. Owens Brockway Glass Container, Inc., plaintiff Linda Austin filed suit against her employer in a district court alleging violations of Title VII and the Americans With Disabilities Act. The district court granted summary judgment to Owens-Brockway because plaintiff failed to submit her claims to mandatory arbitration pursuant to the collective bargaining agreement. The Fourth Circuit affirmed the lower court.

Ms. Austin worked for Owens-Brockway for 14 years until she was injured on the job in 1992. Although her doctor released her for light duty work, the

employer claimed that none existed and Ms. Austin was placed on medical leave with worker's compensation benefits. While on leave, the company eliminated Ms. Austin's former job classification and in June 1993, the director of industrial relations informed Austin that Owens-Brockway had terminated her employment and she would not be reassigned to light duty work.

Ms. Austin filed suit in October 1993 claiming violations of the ADA and Title VII based on the employer's refusal to assign light duty work and termination of her employment, while a male employee, who was the only other employee in the eliminated classification, was reassigned to another position at the plant. The district court granted summary judgment, holding that under Gilmer, Austin was precluded from bringing suit because she failed to submit her claims to arbitration under the collective bargaining agreement.

The collective bargaining agreement at issue specifically stated that a variety of discrimination claims were subject to the contractual grievance procedure:

Article 38
Fair Employment Practice and Equal Opportunity

> 1) The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2) This Contract shall be administered in accordance with applicable provisions of the Americans with Disabilities Act..
>
> 3) Any Dispute under this article, as with all other Articles of this contract, shall be subject to the Grievance procedure.

Article 32 of the Contract provided for final and binding arbitration. Although it should be noted that the case does not contain reference to any contractual provisions dealing with the Arbitrator's scope of authority or use of outside law.

On appeal, the Fourth Circuit dismissed two of Austin's arguments relatively briefly. First, the court held that the argument that she lacked standing to utilize the CBA arbitration procedure since she was terminated was without merit. Basically, the court found that her claims arose upon termination, that the CBA was effective at the time and that she could have asserted her rights under the CBA even after termination. Second, Austin argued that the wording of the CBA made arbitration of discrimination claims permissive, rather than mandatory. The applicable provision stated: "disputes not settled pursuant to procedure set forth in article 31 Grievance Procedures, may be referred to arbitration" (emphasis added). The court stated, however, that it felt "may" gave an aggrieved party a choice between arbitration and abandonment of the claim, not a choice between arbitration and another forum. Thus, the court held the arbitration procedure in the CBA was mandatory, not permissive.

Next, the court cited a myriad of cases which extol the virtues of arbitration and the Federal policy favoring arbitration of labor disputes. Moreover, the court noted the inapplicability of the Federal Arbitration Act. Relying on Gilmer, the Fourth Circuit stated that: "the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable." The Fourth Circuit then proceeded to examine the legislative history of Title VII and the ADA and found that Congress generally encouraged arbitration and other alternative dispute resolution. The majority continued by citing a variety of cases which upheld the Gilmer rationale, but after lengthy discussion, admitted that each cited case dealt with individual employment contracts or securities registration applications, such as were at issue in Gilmer.[49] The Fourth Circuit stated simply: "the only difference between these six cases and this case is that this case arises in the context of a collective bargaining agreement."[50] ThCourt focused on the fact that in all cases an agreement to arbitrate particular disputes had been made and that such agreements, if voluntary, were valid and enforceable.

As to the fact that Ms. Austin's situation involved a collective bargaining agreement, the court reasoned that unions had the right to bargain about terms and conditions of employment and the right to arbitration was a term often bargained for. Further, the Court stated simply that as with many other matters, in labor situations, the Court generally deferred to the grievance procedure between the parties.

Thus, the Court dismissed Plaintiff's claim[51] with no more than a passing reference to Alexander v. Gardner-Denver and no real discussion of the proposition that statutory discrimination may be somewhat different than the typical terms and conditions of employment and the grievance procedure which have been the subject of NLRB and court deferral for many years. Moreover, the majority failed to mention or address the myriad of cases cited by the dissent to reach an alternative conclusion.

In dissent, Justice Hall aptly stated: "the majority concludes 'the only difference between these...cases and this case is that this case arises in the context of collective bargaining agreement.'...I agree. The majority fails to recognize, however, that the only difference makes all the difference."[52] Justice Hall would have held that a union may not waive a member's individual right to pursue statutory claims in a judicial forum.

In support of his position, Hall pointed out that Gilmer did not overrule Gardner-Denver and that this conclusion is supported by later Supreme Court precedent including Livadas v. Bradshaw.[53] Further, the justice cited a myriad of decisions which support the distinction between enforcement of compulsory arbitration of statutory claims made in individual versus collective agreements. Those cases decided in 1995 will be discussed below.

Although, as the majority in Austin v. Owens-Brockway indicates, a variety of cases have been decided under Gilmer, a survey of 1995 cases indicates that when faced with a collective bargaining situation, courts decided cases consistent

with Gardner-Denver. For instance, in Tran v. Tran, the Second Circuit held that an individual covered by a collective bargaining agreement was not required to seek grievance and arbitration of wage-hour claims under the Fair Labor Standards Act and the individual was entitled to have his claims considered on the merits in the district court.[54] Consistent with Tran, the Southern District of NY recently held that an adverse arbitral decision did not preclude an employee working under a collective agreement, from bringing Title VII and Section 1981 claims in federal court.[55]

A number of other District Courts addressed similar issues in 1995. In a case of first impression in Rhode Island, Tang v. State of Rhode Island, the district court held that for purposes of a motion to dismiss, a prior arbitration award did not preclude an employee's later civil rights and Title VII suit in federal court because the arbitration award was related to the employee's rights under a collective bargaining agreement, as opposed to her individual statutory claims.[56] In Tang, the court further noted that the arbitrator's back pay and reinstatement award did not grant the remedy which the employee sought in her civil action, namely injunctive relief, attorney's fees, and punitive damages.

Additionally, the Eastern District of Michigan in Jackson v. Quanex Corp. held that a group of employees' federal and state statutory claims for racial discrimination were not subject to binding arbitration under a collective bargaining agreement.[57] Further, in White v. Honeywell, Inc., a Minnesota District Court clearly stated that in the context of collective bargaining agreements, Gardner-Denver and its progeny, rather than Gilmer, control.[58] In White, the court denied the employer's motion to dismiss the employees Title VII and Section 1981 claims for lack of subject matter jurisdiction or alternatively to stay the matter pending arbitration, because the court determined that the collectively bargained grievance procedure could not be used to deny the statutory rights of employees.

VII. MISCELLANEOUS

Within the past decade the Supreme Court has begun to slowly chip away at the doctrine of affirmative action. Significant decisions limiting the scope of governmental action in affirmative action cases and recognizing the possibility of reverse discrimination from remedies which go too far include Wygant v. Jackson Bd. of Educ.[59] and, more recently, Adarand Constructors v. Pena.[60] Recently, the Fifth Circuit followed the Court's lead in these cases and returned to the issue of affirmative action in higher education admissions policies brought to the forefront in Bakke.[61] In Hopwood v. State of Texas,[62] the court decided that there was "no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows [the University of Texas School of Law] to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."[63] The court began by dismissing the notion that "benign" racial classifications, such as those used in affirmative action plans, should only be reviewed using intermediate scrutiny.[64] Instead, the court held that "any governmental action that expressly distinguishes between

persons on the basis of race" must be reviewed using strict scrutiny.[65] As such, any affirmative action plan used by a state entity must serve a compelling state interest and be narrowly tailored to achieve that goal.[66]

The court then discussed whether the particular reasons for the affirmative action plan in question passed muster. It is here that the court made its most wide ranging and controversial findings. The court held that "any consideration of race or ethnicity...for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[67] In fact, the court went so far as to say that "non-remedial state interests will never justify racial classifications."[68] As such, "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors," would be unconstitutional.[69] However, the court recognized that "state supported schools may reasonably consider a host of factors, some of which may have some correlation with race."[70] The court then addressed the remedial justification for the law school's affirmative action policy.[71]

At this stage of its review the court stated that "a state does not have a compelling state interest in remedying the present effects of [all] past societal discrimination."[72] As such, one state actor cannot justify racial preferences on the basis of other state agencies' actions.[73] Rather, the court held that valid remedial measures would only pass constitutional muster if they specifically remedied the present effects of past discrimination in the particular program where the remedy was utilized. In other words, the remedy is only valid when it is used at an institution where discrimination occurred and when that past discrimination has caused a present "effect...of sufficient magnitude to justify the" remedial classification to be used.[74] The proper constitutional scope of any state's remedial interest is, therefore, limited to the individual state actor which had previously discriminated. According to the Fifth Circuit's interpretation of recent Supreme Court decisions, the state can go no further when enacting affirmative action plans.

ENDNOTES

* The authors wish to thank Antonio Cavallaro, a third year law student, for his assistance.

1. 653 A.2d 1210 (Pa. 1995).

2. The purpose of the Act is to establish a recovery program for municipal pension systems determined to be financially distressed and to avail itself of this program a municipality, whose fund is severely distressed, as was the situation here, must establish a less expensive plan for new hires.

3. 900 P.2d 161 (Haw. 1995).

4. Mass. Comm. College Council v. Commonwealth, 649 N.E.2d 708 (Mass. 1995).

5. Board of Trustees of the University of Maine System v. Associated COLT Staff of the University of Maine and Maine Labor Relations Bd., 659 A.2d 842 (Me. 1995).

6. Association of Pennsylvania State Colleges and University Faculty v. Pennsylvania Labor Relations Board, 661 A.2d. 898 (Pa. Commw. Ct. 1995).

7. Kansas Association of Public Employees v. Kansas Board of Regents, Case No. 75-UD-1-1992, Kansas Public Employee Relations Board (October 18, 1994).

8. 91 N.L.R.B. 1398 (1977).

9. 95 L.R.R.M. 1180 (1977).

10. Kansas Association of Public Employees, Case no. 75-UD-1-1992 at 26-27, citing, Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision, 12 Pac. L.J. 1128 (19--).

11. Kansas Association of Public Employees, Case no. 75-UD-1-1992 at 39.

12. Id. at 40.

13. Id. at 44.

14. Regents of the University of California, 19 PERC ¶26, 110 (California Public Employment Relations Board, 1995).

15. Regents of the University of California (AGSE), Case no. 730-H (California Public Employment Relations Board 1989).

16. William Rainey Harper Community College v. Harper College Adjunct Faculty Association, 653 N.E.2d 411 (Ill. App. Ct. 1995).

17. 115 ILCS 5/2(b) (West 1992).

18. 115 ILCS 5/2(g).

19. Black Hawk College Professional and Technical Unit v. State Educational Labor Relations Board, 655 N.E.2d 1054 (Ill.App. Ct. 1995).

20. 1995 IL H.B. 206.

21. Michigan State AFL-CIO v. Michigan Employment Relations Commission, 538 N.W.2d 433 (Mich. Ct. App. 1995).

22. Mich. Association v. Governor of Mich., 1995 Mich LEXIS 2444 (Mich. 1995). The appeal was granted Sub. Nom. as it is a consolidated appeal of a variety of cases.

23. 652 N.E.2d 750 (Ohio 1995).

24. Bd. of Trustees Univ. of D.C. v. Myers, 652 A.2d 642 (D.C. 1995).

25. 51 F.3d 376 (3d Cir. 1995).

26. Id. at 381.

27. 900 P.2d 601 (Cal. 1995).

28. Doe v. Central Arkansas Transit, 900 S.W.2d 582 (Ark. Ct. App., en banc, 1995).

29. Falgren v. State, 529 N.W.2d 382 (Minn. Ct. App. 1995).

30. See, Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Perry v. Sinderman, 408 U.S. 593, 601 (1972).

31. See, Loudermill, 470 U.S. 532 at 542.

32. 59 F.3d 446 (3d Cir.), cert denied, 64 U.S.L.W. 3573 (1996).

33. McDaniels, 59 F.3d 446 at 454, citing, Loudermill, 470 U.S. 532 at 547-8.

34. A pre-termination hearing though necessary need not be elaborate and "the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Loudermill, 470 U.S. 532 at 545, citing, Bodie v. Connecticut, 401 U.S. 371, 378 (1971).

35. As long as the decision maker at the post-termination proceeding is impartial a showing of bias at the pre-termination hearing is irrelevant. McDaniels, 59 F.3d 446 at 459, citing, Walker v. City of Berkley, 951 F.2d 182, 184.

36. 73 Ohio St.3d 52.

37. Logan v. Bennington College Corp., 72 F.3d 1017, 1025-26 (2d Cir. 1995).

38. Id. at 1026.

39. Id. at 1027, citing, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

40. 898 S.W.2D 517 (Ky. Ct. App. 1995).

41. Id. at 521.

42. Id 42.

43. Collins v. Rector and Bd. of Visitors of the Univ. of Va., 873 F.Supp. 1008 (D.C. Va. 1995).

44. Nayar v. Howard Univ., 881 F.Supp. 15 (D.D.C. 1995).

45. 652 N.E.2d 1306 (Ill. Ap. Ct. 1995).

46. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

47. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

48. Austin v. Owens-Brockway Glass Container, Inc.---F3d---, 1996 WL 10738 (4th Cir., 1996).

49. See, Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir., 1992) (securities registration application), Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir., 1991) (securities registration application), Alford v. Dean Witter Reynolds, Inc., 934 F.2d 229 (5th Cir., 1991) (securities registration application), Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir., 1992) (individual employment contract), Benefits Communications Corp. v. Kleforth, 642 A.2d 1299 (D.C. 1994) (securities registration application), Fletcher v. Kidder Peabody & Co., 81 N.Y. 2d 623 (N.Y. 1993) cert denied, 114 sct. 554 (1993).

50. 1996 WL 107138 at 9.

51. It should be noted that Plaintiff's claim was dismissed without prejudice and the Court expressed no opinion as to whether arbitration would or should now be available or whether Austin's actions had rendered her claims unenforceable. See, 1996 WL 107138 at 10-11.

52. Id. at 11.

53. See Livadas v. Bradshaw, ___U.S.___, 114 S.Ct.2068, 2080 N.-21.

54. Tran v. Tran, 54 F.3d 115 (2d Cir. 1995).

55. Humphrey v. Council of Jewish Federations, 901 F.Supp. 703(S.D.N.Y. 1995).

56. Tang v. State of Rhode Island, Dept. of Elderly Affairs, 904 F.Supp. 69 (D.C. 1995).

57. Jacksons v. Quanex Corp., 889 F.Supp 1007, (E.D. Mich. 1995).

58. White v. Honneywell, Inc., 1995 WL 783694 (D.C. Minn. 1995).

59. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279 (1986)(Holding that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.").

60. Adarand Constructors v. Pena, 115 S.Ct. 2097 (1995).

61. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

62. F.3d, 1996 U.S. App. LEXIS 4719 (5th Cir. 1996).

63. Hopwood, 1996 U.S. App. LEXIS 4719 at 1.

64. Id. at 20.

65. Id. at 21, citing, Adarand Constructors v. Pena, 115 S.Ct. 2097, 2113 (1995).

66. Id. at 22, citing, Adarand, *supra* note 3, at 2117.

67. Id. at 35.

68. Id. at 35.

69. Id. at 41.

70. Id. at 41.

71. The school stated that its affirmative action program was enacted in order to remedy the present effects of past discrimination in Texas' primary and secondary schools.

72. Id. at 52.

73. Id. at 57-8.

74. Id. at 61, citing, Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994).